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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 597

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER OF CRESCENT CITY LAUNDRIES, INC., ETC.,

Petitioner,

versus

NATIONAL LINEN SERVICE CORPORATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. .....

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER OF CRESCENT CITY LAUNDRIES, INC., ETC.,

Petitioner,

versus

NATIONAL LINEN SERVICE CORPORATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Now comes Mrs. Odile V. Hubert Tucker, as a stockholder of Crescent City Laundries, Inc., and prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review here the record, decision, and judgment entered by that court in the above action on January 5, 1953 (R. 201).

OPINION BELOW.

The opinion of the Court of Appeals was rendered on January 5, 1953 (R. 187), and is reported in 200 F. (2) 858. By order dated January 15, 1953, Appellant below was granted special leave to file a petition for rehearing at any time prior to February 11, 1953 (R. 201). Petition for rehearing was filed February 10, 1953 (R. 202), and it was denied March 3, 1953 (R. 271). The judgment of the district court dismissing the action was rendered without opinion, and is found in (R. 179).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

SUMMARY STATEMENT.

Petitioner, a citizen of Louisiana and a stockholder of Crescent City Laundries, Inc., a Maine corporation, instituted this stockholder's derivative action on behalf of Crescent in the Northern District of Georgia, Atlanta Division. Jurisdiction is based upon diversity of citizenship and the amount involved exceeds $3,000, exclusive of interest and costs.

The defendants are Crescent, three Delaware corporations, several individuals, and the personal representatives of two deceased persons, one of whom has died since the

judgment was rendered in the court below and his executors became parties in his stead (R. 272), all of whom are citizens of Georgia, and S. W. Souers, a citizen of Missouri.

The action seeks a recovery for Crescent of personal property within the district, consisting of certain specific shares of common stock of National Linen Service Corporation, a corporation domiciled in the district (R. 7), which stock is claimed to be the property of Crescent. The complaint alleges that said stock was fraudulently misappropriated by Crescent's directors in 1928, pursuant to a conspiracy between said directors and others, including some of the defendants who held said stock as Voting Trustees under a Voting Trust Agreement, to defraud Crescent of said stock and to conceal the fraud. The complaint further alleges that the fraudulent misappropriation of said stock was successfully concealed from Crescent until December 3, 1941. The complaint was filed on November 23, 1951 (R. 88).

All of the defendants, except Southern Linen Supply Corporation, filed motions to dismiss the complaint on various grounds, and the defendant S. W. Souers appeared specially and moved to dismiss as to him upon the ground of improper venue. The defendant Souers, though a citizen of Missouri, was served personally within the district with a copy of the complaint and process.

The defendants moved to dismiss the complaint because of: absence of indispensable parties who are citizens of the State of Louisiana; failure of the complaint to state a claim for relief; the statutes of limitations of Louisiana

and Georgia; laches; *res judicata;* and that the causes of action sued on have passed by a sheriff's sale conducted July 9, 1942, in Orleans Parish, Louisiana, upon *fieri facias* issued upon a judgment against Crescent.

The district judge, without stating his reasons, sustained the motions to dismiss.

On appeal to the United States Court of Appeals for the Fifth Circuit the court below rendered a decision and judgment affirming the judgment of the district court in dismissing the action.

This petition seeks a review of said decision and judgment of the United States Court of Appeals for the Fifth Circuit upon the record.

SPECIFICATION OF ERRORS.

The court of appeals erred in rendering the decision and judgment sought to be reviewed in the following respects:

1. In affirming the judgment of the district court.

2. In making misstatements of material and controlling facts, contrary to the record, and upon which misstatements of facts it based its decision and judgment, as follows:

(a) The court below misstated as facts (R. 200):

> "The pleadings will be searched in vain to find any basis for the claim that the number of shares distributed to and accepted by Crescent was secret and kept so. Its minutes showed: that 27,735 shares were first issued to it; that it surrendered this certificate and accepted a new certificate for 23,548 shares; and that the 4,187 shares surrendered were issued to McClellan."

whereas, Paragraphs 54 and 56 (R. 27, 29) of the complaint, which must be taken as true upon considering a motion to dismiss the action, allege in effect that no resolution whatever was spread upon Crescent's minutes with respect to 27,735 shares prior to the discovery of the fraud on December 3, 1941, and that the issuance of said 27,735 shares was concealed from Crescent from 1928 to 1941.

(b) The court below erroneously found as facts (R. 199):

> "What was done was spread upon the records at the time, and there was no concealment,"

whereas, the complaint alleges facts to the contrary, which are also required to be taken as true, in Paragraphs 25(b) and (c), 26(b), 26(d), 26(e), 54 and 56, supra, 70, 72, 171 and 172 (R. 13, 15-17, 27, 29, 32, 33 and 78). Also, the specific facts which were concealed from Crescent were alleged in the former complaint (R. 221-224).

3. The court below erred in arbitrarily holding that a federal district court is without equitable jurisdiction to enter a decree, adjudicating title to personal property

within the district, in an action brought by a stockholder on behalf of his corporation No. 1, claiming title on its behalf to specific shares of the common stock of corporation No. 2, represented by a certificate issued in the name of and held by an individual defendant in the action, wherein both corporations were served as defendants, in the absence from the action of a person in whose name another certificate for different shares of the common stock of corporation No. 2 has been issued, notwithstanding that complete diversity exists between the plaintiff and all defendants and the amount involved exceeds $3,000, exclusive of interest and costs.

4. The Court below erred, while considering whether or not the judgment of the district court dismissing the complaint for failure to state a claim was error, in arbitrarily considering as evidence an exhibit attached to the complaint in a former action between the parties, and in concluding that said exhibit disclosed the existence of a valid contract entitling Souers to receive 50,000 shares of common stock of National (R. 198, 200), notwithstanding the fact that the former complaint, to which said exhibit was attached, alleged that the agreement shown by said exhibit was fraudulent, contrary to public policy, and void, for the reason that it was executed by officers of two corporations, pursuant to a conspiracy to defraud said corporations, in breach of their fiduciary duties to said corporations, and for the purpose of obtaining secret profits for themselves at the expense of said corporations, in a transaction involving the business of said corporations whose interests they were in duty bound to protect. A dismissal of said former action was

affirmed by the court below solely upon the ground that diversity jurisdiction was lacking and no adjudication was made in said case as to the validity or invalidity of said agreement. *Tucker v. National Linen Service Corporation,* 188 F. (2) 265.

5. The court below erred in arbitrarily construing the action as a suit *in personam* and not in any sense a suit *in rem* which would sustain an action as to S. W. Souers, a citizen of Missouri, on substituted service (R. 196), in that, as to Souers the action is one *quasi in rem,* since the only demand for relief as to Souers, (g) (R. 84), is; that the court impress a constructive trust upon 54,000 shares of common stock of National Linen Service Corporation, now standing in his name on the books of National, and compel National to cancel the certificate or certificates representing said shares and to issue a new certificate therefor to Crescent, and is, therefore, such an action as may be sustained by substituted service upon Souers under *Section 1655, Title 28, U. S. C. Jellinick v. Huron Copper Min. Co.,* 177 U. S. 1.

6. The court below erred in making an arbitrary and unprecedented application of the doctrine of *res judicata* in this action by holding that the judgment of the District Court of the United States for the Eastern District of Louisiana, in the case of *Kohler v. McClellan, et al.,* being Civil Action No. 753, dismissing said action, which judgment was affirmed by the court below in an opinion reported in *Kohler v. McClellan,* 156 F. (2) 908, wherein Crescent, in another stockholders' derivative action brought on its behalf, was refused a recovery against

several joint tort feasors who participated in the fraud against Crescent alleged in the complaint in this action, constitutes a bar to this stockholder's derivative action on behalf of Crescent, brought in the State of Georgia, against others among said joint tort feasors participating in the fraud, but who were not parties to the Louisiana case. *Bigelow v. Old Dominion C. Min. & S. Co.*, 225 U. S. 111.

7. The court below erred in making an arbitrary and unprecedented application of the statutes of limitations and the doctrine of laches (R. 199), so as to bar this stockholder's derivative action on behalf of Crescent to recover its corporate property which was misappropriated, in violation of an express trust, and pursuant to a conspiracy between its directors and others to defraud said corporation out of said property and to conceal the fraud, upon the grounds: of the great lapse of time and great changes in circumstances, including therein the great depression in the thirties, the great changes in value, the deaths of many of the witnesses, and that there was no concealment of the fraud. Said ruling is error because:

(a) The fraud was committed in 1928 and was not discovered until December 3, 1941. The great depression in the thirties had expired before the discovery of the fraud. Actions against trustees may be brought in Georgia within ten years from discovery of fraud. *Ga. Code Sections 3-709 and 3-807.*

(b) As between cestui que trust and trustee, and all parties claiming under the trustee, otherwise than by purchase for a valuable consideration without notice, all property belonging to a trust, however

much it may be altered in its nature or character, and all the fruits of such property, including the increase in value, whether in its original or altered state, continues to be subject to or affected by the trust. *United States v. Dunn,* 268 U. S. 121, 132.

(c) All of the individual defendants were living when this action was filed and only one has since died. The personal representative of only one conspirator, George H. Fauss, is an original party defendant. The remaining individual defendants are all still active in business and competent to explain their conduct as trustees are required to do when called upon by their cestui que trust. Each of the individual defendants were fiduciaries of Crescent.

(d) The complaint alleges concealment of the fraud, many times (2(b) *supra*) and the court below was required to accept these allegations of concealment of the fraud as true, no fact to the contrary appearing from the pleading or exhibits.

(e) The directors who participated in the fraud have at all times since the commission of the fraud been in control of Crescent (R. 80), thus rendering Crescent impotent to itself institute an action for the recovery of said misappropriated trust assets.

8. The court below erred in holding (R. 199) that it had determined in *Kohler v. McClellan,* 156 F. (2) 908 that the claims or causes of action of Crescent in respect of the distribution of the common stock of National passed to the purchaser at the Sheriff's sale and have not since been the property of Crescent, for the reason that the court below affirmed the judgment dismissing the complaint as to said claims *solely* upon the ground that an

indispensable party to the trial of the title to said claims was absent from the case, using the following language (156 F. (2) at p. 910):

> "Therefore, in the absence of the owner of all claims of Crescent sold at the Sheriff's sale, the court below could only adjudicate upon the claims connected with and arising out of the sale itself."

Thus, the merits of Crescent's claims to the ownership of all the property it owned prior to said Sheriff's sale, and which included its claims in respect of the distribution of the common stock of National, were left unconsidered and undisposed of by the *Kohler* case, *supra, St. Romes v. Levee Cotton-Press Co.*, 127 U. S. 614.

9. Even if the court below may be said to have determined in the *Kohler case, supra,* that the claims or causes of action of Crescent in respect of the distribution of the common stock of National passed to the purchaser at the Sheriff's sale and have not since been the property of Crescent, said decision was error, and it was error for the court below to perpetuate its error in said decision by following said decision in this case, and by here holding that the claims or causes of action of Crescent in respect of the distribution of the common stock of National passed to the purchaser at the Sheriff's sale and have not since been the property of Crescent. In so holding, the decision of the court below has decided an important question of local law of the State of Louisiana, in a way in conflict with local Louisiana decisions which are *stare decisis* with respect to the nature of the de-

scription required by law to be made of property in the levy and advertisement, in order to divest the title of property out of a defendant in *fi. fa.* at an enforced execution sale. Under said local decisions the title of Crescent to claims in respect to the distribution of the common stock of National could not have been passed to the purchaser at the Sheriff's sale, because of the legal insufficiency of the description of said claims in the levy and advertisement upon which the pretended Sheriff's sale was bottomed.

10. The court below erred in misstating the facts shown by the record in this case and by the record in the former case, and in basing its decision and judgment on the following misstatement of facts (R. 200):

> "As to the claims made in this suit for the 50,000 shares which were issued to Souers, no reason whatever for impeaching the arrangement by which Souers was to receive these shares for his services was shown."

The arrangement by which Souers was to receive the 50,000 shares was the fraudulent agreement attached to the former complaint marked "Exhibit C", and many valid reasons for impeaching said agreement were set out in Paragraphs 111 and 116 (R. 212-216), and Paragraph 156 (R. 221) of the former complaint. The former complaint is filed of record in this Court in Case No. 211, October Term, 1951, entitled *Tucker on behalf of Crescent City Laundries, Inc. v. National Linen Service Corporation, et al.*, (Mem) 348 U. S. 828.

A summary statement of the facts pleaded in Mrs. Tucker's former complaint is contained in (R. 250-253).

REASONS FOR GRANTING THE WRIT.

This Court should grant this application for the writ of certiorari and should review and reverse the decision and judgment of the court of appeals, so that our judicial processes shall continue to be governed by established rules of law and equity, instead of being subject to the less stable personal whims of individual judges.

The decision and judgment of the court below affirming the judgment dismissing this action is without any support in the established rules of law and equity, as heretofore applied by our courts in cases where the facts pleaded were similar to those pleaded in this action.

The decision of the court below departs from the accepted and usual course of judicial proceedings, in the following particulars:

(1) It patently misstates the facts pleaded so as to conclude that there was no fraud or concealment of fraud, notwithstanding that the complaints considered by the court alleged both fraud upon Crescent and the concealment of the fraud by the defendants, with great particularity.

(2) It makes an arbitrary and unprecedented application of the rule governing indispensable parties, by re-

fusing to sanction the entry of a decree adjudicating title to specific shares of corporate stock, constituting personal property within the district, and which is claimed by only two persons, unless other persons who do not have or claim to have any interest in said specific shares, but who own other and different shares of such corporate stock, are made parties to the action.

(3) It arbitrarily considered evidence while determining an appeal from a judgment dismissing the complaint for failure to state a claim for relief.

(4) It arbitrarily rules that the action as to the defendant Souers is one *in personam,* even though the complaint clearly shows that, as to said Souers, the action was strictly limited to one *quasi in rem.*

(5) It makes an arbitrary and unprecedented application of the doctrine of *res judicata* by holding, that a judgment of a court of one state refusing a recovery against some of several joint tort feasors who defrauded Crescent and its minority stockholders, is a bar to an action on behalf of Crescent against others of said several joint feasors, in another state, although none of the defendants in the last suit were parties to the first action.

(6) It makes an arbitrary and unprecedented application of the statutes of limitations and the equitable doctrine of laches, in such manner as to bar a stockholders' derivative action on behalf of their corporation for the recovery of specific personal property which belongs to the corporation, and which was misappropriated in violation of an express trust, pursuant to a conspiracy

between the corporation's directors and the defendants to defraud the corporation of said property and to conceal the fraud, notwithstanding the fact that the directors participating in the fraud and who concealed it, have remained in control of the corporation at all times since the fraud was committed, and the delay in bringing suit is in no wise the fault of the corporation itself.

Such departures from the accepted and usual course of judicial proceedings in the decision below, together with the fact that said decision is otherwise without support under established rules of law and equity, makes it such a decision as to call for an exercise of this Court's power of supervision.

A further reason for granting the writ is because the decision of the court below decides an important question of local law in a way in conflict with applicable local decisions. In deciding that the title to property, which is not described in the seizure so that it could be identified, may be divested out of a defendant in execution at a Sheriff's sale in Louisiana, based upon such seizure, the decision is in conflict with the following local decisions on this important question:

McGary v. Dunn, 1 La. Ann. 338.
Gales v. Christy, Assignee, 4 La. Ann. 293.
Dearmond v. Courtney, 12 La. Ann. 251.
Pickersgill v. Brown, 7 La. 304.
Mullin v. Jones, 153 La. 1091, 73 So. 202.

The value of the property which was not described in said seizure so as to be identified, the title to which is illegally divested out of Crescent by said decision, ex-

ceeded, at the time of said Sheriff's sale, two million ($2,000,000.00), as alleged in Paragraph 326 of the complaint in Case No. 211, October Term, 1951, of this Court, which allegation may be found at page 188 of the record in that case.

Congress has adopted a public policy to encourage the bringing of stockholders' derivative actions in the federal courts where diversity and the requisite amount are present. The injured corporation may be served extraterritorily with process. *Section 1695, Title 28 U. S. C.* Congress further provided that such derivative actions might be brought in any judicial district where the injured corporation might have sued the same defendants. *Section 1401, Title 28, U. S. C.* This liberal public policy should be enforced by the federal courts, and should not be defeated by the arbitrary and unprecedented ruling of the court below, that persons who have no justiciable interest whatsoever in the specific property which is sought to be recovered on behalf of the injured corporation in such an action, are indispensable parties whose absence from the action renders a federal court of equity powerless to reach the wrongdoers.

The decision and judgment are unconscionable because absolutely at variance with the principles of equity jurisprudence established by this Court. The immediate effect of the decision and judgment of the court below, unless reversed, will be to thwart the will and policy of Congress, and insure a complete failure of justice by placing the stamp of judicial approval upon an iniquitous fraud.

WHEREFORE, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review here the record, decision and judgment entered by that court in the above action.

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BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in 200 F. (2) 858. The district court dismissed this action without stating its reasons.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code. The judgment was rendered by the court below on January 5, 1953 (R. 201). Petition for rehearing was denied on March 3, 1953 (R. 271). This petition and brief are filed in this Court within ninety days after the judgment denying a rehearing as permitted by Section 2101(c), Title 28, United States Code, and *Gypsy Oil Co. v. Escoe,* 275 U. S. 498.

STATEMENT OF THE CASE.

This action was brought in the Northern District of Georgia on November 23, 1951, by Mrs. Odile V. Hubert Tucker, a Louisiana citizen, as a stockholder of Crescent City Laundries, Inc., a Maine corporation, on behalf of Crescent (R. 6), to enforce its claim to personal property within said district consisting of 487,683 shares of the common stock of the defendant National Linen Service Corporation (R. 7, 77). The defendants named were:

Crescent, the injured corporation, National Linen Service Corporation, Atlanta Laundries, Inc., (R. 5), and Southern Linen Supply Corporation (R. 167), all three being Delaware corporations doing business in said district, S. W. Souers, a citizen of the State of Missouri (R. 197), and Trust Company of Georgia, Executor of George H. Fauss, T. A. Martin, Herbert J. Haas, I. M. Weinstein, A. J. Weinberg and J. B. Jacobs, all of whom are citizens of the State of Georgia residing in said district.

All of the defendants were served with a copy of the complaint and process within the district, except Crescent, who was served in the Northern District of Maine (R. 142), under the provisions of *Section 1695, Title 28 U. S. C.*

All of the defendants, except Southern Linen Supply Corporation and S. W. Souers, appeared generally and filed motions to dismiss the complaint upon various grounds. Southern Linen Supply Corporation did not appear. S. W. Souers appeared specially, contending the venue is improper as to him because he is a non-resident of the State of Georgia, and moved to dismiss the case upon this and other grounds (R. 143). The district court sustained the motions and dismissed without opinion (R. 179) and the court below affirmed (R. 201).

THE COMPLAINT.

The complaint alleged (R. 9): that on August 23, 1928, the stockholders of National authorized the acceptance

by National of deeds and instruments of conveyance from Southern, Atlanta, and Crescent, conveying certain properties of said corporations to National, and directed the proper officers of National to issue and deliver to, or upon the order of said companies in payment for said properties, certain shares of preferred and common stock of National; that National issued the preferred stock and delivered the same to said companies; that National issued and delivered its certificate No. 1 for 150,000 shares of its full paid common stock on November 16, 1928, to I. M. Weinstein, A. J. Weinberg, J. B. Jacobs, Sidney W. Souers, B. C. McClellan, Charles Leftwich and W. Irving Moss, Voting Trustees; that the beneficial ownership of said 150,000 shares of common stock was at that time vested in Southern, Atlanta, and Crescent, which corporations had supplied all of the assets of National in payment of which said stock was issued; that said Voting Trustees accepted the said 150,000 shares pursuant to an express trust agreement in writing establishing a voting trust for the common stock of National, dated as of September 1, 1928, a copy of which trust agreement is attached to the complaint marked Exhibit "A" (R. 88); that (R. 11) it was the duty of said Voting Trustees to cause a Stock Trust Certificate to be issued to each owner of said common stock of National certifying to the number of shares of common stock for which each stockholder would be entitled to receive a certificate upon the termination of said voting trust; that no person or corporation had any interest in said trust estate consisting of said 150,000 shares of common stock other than Southern, Atlanta, and Crescent; that Southern accepted, as its portion of said 150,000 shares, 50,000 shares, and Stock Trust

Certificates for its 50,000 shares were issued to its stockholders upon its instructions on May 22, 1929; that Atlanta accepted, as its portion of said 150,000 shares, 16,165 shares, and, a Stock Trust Certificate for 16,165 shares was issued and delivered to said company on November 16, 1928; that after full discovery of facts, sometime in 1946 or 1947, Atlanta then claimed that it became the owner of only 22,265 shares of common stock of National when it conveyed its assets to National in 1928 (R. 12); that Crescent (R. 13) was the owner at all times of all of said shares of common stock of National which were not owned by Southern and Atlanta, to-wit: 77,735 shares; that said Voting Trustees were obligated by the terms of Exhibit "A" to cause to be issued and delivered to Crescent a Stock Trust Certificate for 77,735 shares of common stock of National; that said Voting Trustees violated their said obligation and breached their trust by conspiring among themselves, and with certain other officers and directors of Crescent, and with all the defendants here sued, except Southern, all of whom knew of the positions of trust and confidence occupied by said Voting Trustees toward Crescent, under the terms of Exhibit "A", to defraud Crescent out of 54,187 shares of said common stock, and to conceal said fraud; that they executed said conspiracy by causing Stock Trust Certificates representing said 54,187 shares of said common stock to be issued by the duly authorized agent of said Voting Trustees in the names of a *majority* of Crescent's said officers and directors and in the names of said other persons so confederating with them, and concealed said facts from Crescent; that said Voting Trustees constituted a majority of the directors of National (R. 14); that National Linen

Service Corporation was represented in said conspiracy by all of the members of its Board of Directors; that Atlanta Laundries, Inc. was represented in said conspiracy by B. C. McClellan, S. W. Souers, G. H. Fauss, T. A. Martin (R. 17), S. R. Greenblatt (R. 168), and Arthur I. May (R. 17), who constituted a majority of its Board of Directors, and by Herbert J. Haas, its regularly retained General Counsel; that said conspiracy to defraud Crescent and to conceal the fraud was entered into by the defendants charged, in New Orleans, Louisiana, and Atlanta, Georgia on or before November 20, 1928 (R. 27); that the only information contained in the Minute Book of Crescent purporting to reflect corporate action with respect to the conveyance of its assets to National and the consideration received by Crescent therefor was minutes of a purported meeting of directors on October 10, 1928, which was not attended by a quorum of the board, but was attended by four directors and an assistant secretary of the corporation, all of whom were members of said conspiracy and received some of said shares pursuant to said conspiracy; that the minutes of the meeting of said conspirators, who pretended to act as Crescent's board of directors recited (R. 27): "the minutes of the last meeting of the Board of Directors held on August 5, 1928 . . . were unanimously approved . . . The Chairman presented to the Board a contract . . . that had been put into effect and pursuant thereto a corporation entitled National Linen Service Corporation had been formed, and he, acting for this company, had conveyed to it the property contemplated to be conveyed by this company under said agreement in exchange for 23,548 shares of its common stock and 2901 shares of its preferred stock. On motion

duly made, seconded and adopted, the action of Mr. McClellan in connection with said matter was approved, ratified and confirmed;" that prior to December 3, 1941, Crescent never had any corporate knowledge of the fraud which had been perpetrated upon it, as alleged, all of its corporate action being customarily recorded in its minute book which reflects an absence of any corporate knowledge in respect thereof (R. 29); that Herbert J. Haas was an attorney-at-law representing Crescent, Atlanta, and National, and Souers and McClellan, promoters of National, in effecting the transfer of the assets of Crescent and Atlanta to National in 1928, and it was his duty to protect the interest of Crescent and to see to it that Crescent received the consideration paid by National for Crescent's assets (R. 75); that Herbert J. Haas, B. C. McClellan, Carmelo D'Antoni, C. L. Sawyer, Leon D. Hubert, Max N. Kohler, Charles Leftwich, Mike M. Moss, and W. Irving Moss fraudulently concealed from Crescent the facts and circumstances set out in the complaint, and by such fraud and concealment prevented Crescent from discovering said facts, all of which was done in furtherance of said conspiracy to defraud and to conceal the same, and said persons were the only officers, or agents, of Crescent who had knowledge of said facts prior to December 3, 1941, and by reason of the positions of trust and confidence occupied by said persons with Crescent, said corporation was prevented from discovering said facts and from taking action for the redress of the wrongs perpetrated upon it (R. 32, 33): that Crescent did not discover the fraud until on or after December 3, 1941, at which time Max N. Kohler, one of the conspirators, caused a letter to be written to

Crescent disclosing the fraud; that all of Crescent's directors acquired knowledge of the fraud during the early part of the year 1942, as a result of an investigation of the charges made by Kohler in said letter; that Crescent's Board of Directors, at a special meeting of said board held on April 13, 1942 (R. 45), a quorum of directors being present at said meeting, passed a motion instructing the Secretary of the Company to reply to another letter from Kohler's attorneys, dated April 6, 1942, and directing him to state in said reply that "Despite exhaustive search, the company has not been able to locate any original signed agreement between it, and Atlanta Laundries, Inc. for the formation of National Linen Service Corporation, nor does the company have any signed authorization by it or its officers for the distribution of the stock of National Linen Service Corporation"; that at said meeting the Secretary of Crescent was instructed by the Board (R. 47) to write a letter to B. C. McClellan making a demand upon him for 4,187 shares of the common stock of National Linen Service Corporation, stating therein that there was originally issued in the former name of the company, Laundry & Dry Cleaning Service, Inc., a Voting Trust Certificate for 27,735 shares of the common stock of National Linen Service Corporation, and that on instructions from Mr. McClellan, there was finally issued in the same name a Certificate for only 23,548 shares, and the remaining 4,187 shares of said stock, represented by Voting Trust Certificates, were issued in the name of B. C. McClellan and delivered to him on or about November 10, 1928; that instead of faithfully representing the interests of Crescent and its stockholders, by seeking in good faith to recover said assets or their value and attempting to preserve Crescent as a going concern if pos-

sible, as it was their duty to do (R. 35), a majority of the members of said Board of Directors permitted their personal interests to conflict with their fiduciary duties, and breached their trust as such fiduciaries, by (R. 71) conspiring with the majority stockholders of Crescent to cause a default judgment to be rendered and confirmed against Crescent upon its outstanding bonds, which were beneficially owned by said conspirators, and caused the major portion of Crescent's assets to be seized upon writ of *fieri facias* based upon said judgment, and sold to a committee of said bondholders for the purpose of conveying said assets to a corporation owned by said bondholders, including a majority of Crescent's stockholders and directors, and to exclude minority stockholders of Crescent from any interest in said assets; that by virtue of the *fieri facias* issued upon said judgment (R. 52), on the 2nd day of June, 1942, Louis Knop, Jr., the Civil Sheriff for the Parish of Orleans, Louisiana, seized certain assets belonging to Crescent, and advertised the same for sale at public auction; that (R. 57) on July 9, 1942, the Civil Sheriff of said Parish offered for sale the property of Crescent described in said seizure and advertisement when Monte M. Lemann being the last and highest bidder for account of the Bondholders' Protective Committee composed of Ralph C. Lally, Charles Leftwich and William P. Stewart, the property was declared by said Sheriff to be adjudicated to said Bondholders' Protective Committee for the price or sum of $1,600,000, said amount being less than one-half of the actual value of the property described in said seizure and advertisement; that (R. 58) said Sheriff did not seize, advertise, or sell Crescent's claims against persons

who were liable to it for the injury caused to it by the unlawful diversion of its interest in said 54,187 (Amendment, R. 168) shares of common stock of National Linen Service Corporation, as shown (R. 58) by a description of the assets of Crescent which were seized by said Civil Sheriff on June 2, 1942, attached to the complaint marked Exhibit "B" (R. 117); that on (R. 58) July 10, 1942, said Bondholders' Protective Committee conveyed the assets acquired by them at said sale to New Orleans Laundries, Inc., in consideration of 16,750 shares of its capital stock being issued on that date to named persons who were holders of Crescent's bonds, and included among said persons were a majority of Crescent's directors and stockholders (R. 60). That said majority directors and said majority stockholders so conspiring, in breach of their fiduciary duties to Crescent and its minority stockholders, abandoned Crescent's business and wholly failed to seek to redress the wrongs perpetrated upon it by the misapplication of said trust assets; that Crescent has not been compensated in any way for the loss of said shares of stock and the dividends accruing thereon, (R. 73); that the Voting Trust Agreement was terminated in 1944, and certificates for shares of common stock of National were issued by National to the persons holding Stock Trust Certificates representing said 54,187 original shares, and that said Stock Trust Certificates and the certificates for shares of common stock which were issued by National to the holders of said Stock Trust Certificates, were issued without any consideration being paid to National for the shares represented by said certificates, contrary to law (R. 76); that the consideration for the shares of common stock of National represented by said certificates was paid

to National by Crescent and Crescent became the lawful owner of said shares of stock; that all persons who received said certificates, because of their fraud and wrongdoing and their failure to pay anything for said certificates, thereby became trustees *ex maleficio* or constructive trustees holding said certificates and the shares of stock which they represented for the benefit of Crescent, the lawful owner of said shares of stock; that the statute law of Delaware which has at all times governed the rights of Crescent and the obligation of National in the premises, is Section 1929 of the Revised Code of Delaware of 1915, which reads "1929. Sec. 15. Certificate of Shares:—Every stockholder shall have a certificate under the seal of the corporation signed by the President or a Vice-President and either the Treasurer or Assistant Treasurer or the Secretary or an Assistant Secretary, certifying the number of shares owned by him in such corporation;" that Crescent is entitled, by virtue of said statute of Delaware, to be issued a certificate by National Linen Service Corporation, properly signed, certifying that Crescent City Laundries, Inc. is the owner of 487,683 shares of the presently authorized common stock of said corporation, which number of shares would be the equivalent of 54,187 shares of the original common stock of said corporation; that Crescent was prevented from learning how many shares of the common stock of National it was entitled to receive for the assets which it conveyed to National in 1928 out of said 150,000 shares, for the reason that pursuant to said conspiracy to defraud and to conceal said fraud, the conspirators caused the resolution of the stockholders of National of August 23, 1928, authorizing the issuance of 150,000 shares of com-

mon stock in payment for the properties conveyed to National by Southern, Atlanta, and Crescent, to be so written that it provided for the issuance of 50,000 of said shares to Southern, but it did not specify how the remaining 100,000 shares were to be divided between Atlanta and Crescent; that no corporate action is reflected in the minutes of either Atlanta or Crescent as to how said remaining 100,000 shares would be divided between said two corporations; that the minutes of a meeting of the Board of Directors of Atlanta, held July 26, 1928, recite only that it was to receive "a portion of 50,000 shares" of said common stock; that complainant learned during the month of May 1949 that Atlanta Laundries, Inc. had claimed in Civil Action No. 3104 in the district court below, that it became the owner of only 22,265 shares of common stock of National when it conveyed assets to National in 1928; that complainant instituted actions in district courts at Atlanta and New Orleans on August 8, 1949, upon the claims here asserted, both of which were dismissed for lack of diversity jurisdiction, and were finally terminated when this court denied certiorari on October 8, 1951; that complainant has made no effort to secure from the managing directors or from the stockholders of Crescent the institution of this action because, for reasons assigned (R. 80), such a demand would be useless and unavailing, or, if granted, the litigation would necessarily be under the control of parties opposed to its success. Demands for relief are: that the court impress a constructive trust in favor of Crescent upon the number of shares of stock shown to have been so fraudulently received, or any portion thereof, standing in the names of Herbert J. Haas, T. A. Martin, S. W. Souers,

and Trust Company of Georgia, Executor of George H. Fauss, on the books of National, and that said defendants, except Souers, be required to surrender certificates representing said shares to National for cancellation, and to account to Crescent for all dividends paid upon said shares, and if said shares have been sold, that Crescent have a personal judgment for the proceeds thereof with lawful interest; that I. M. Weinstein, J. B. Jacobs, and A. J. Weinberg account to Crescent for the net dividends on said 54,187 original shares of stock, and their increase, paid to them by National as Voting Trustees of said stock; that National account to Crescent for dividends paid on said 54,187 original shares, or their increase, from the date said corporation ceased to pay dividends to the Voting Trustees on said stock; that Crescent recover judgment against all the defendants, except Souers and Southern, for the total of all dividends paid, plus lawful interest thereon; that National be compelled to issue to Crescent a certificate for 487,683 shares of its common stock, or, for such number reduced by the aggregate number of shares which may be recovered from the said Haas, Martin, Souers, and the executor of Fauss; or, in the alternative, (R. 176) if none of said shares may be recovered, that judgment be rendered against all the defendants, except Souers and Southern, for the highest market value of 54,187 shares of the original common stock of National Linen Service Corporation, and the increase thereof, attained between November 16, 1928 and the date of said judgment.

GROUNDS OF MOTIONS TO DISMISS

The defendant S. W. Souers (R. 195), appearing specially, filed a motion to dismiss as to himself for improper venue, and also a motion to dismiss for want of diversity and of indispensable parties. Subject to these motions he moved to dismiss on the merits on the grounds: (1) that no cause of action was stated; (2) that it appears from the face of the complaint that the claims asserted are not the property of Crescent City Laundries but, if existent, are the property of New Orleans Laundries as a result of the Sheriff's sale; (3) that the suit is barred by the statutes of limitations of Louisiana and Georgia; (4) that it is barred by laches, the matters complained of occurring in 1928, and plaintiff alleging no fact which prevented an earlier discovery of the alleged wrong.

National Linen Service Corporation (R. 196) and the other defendants, except Southern, moved to dismiss for want of indispensable parties who are residents of Louisiana. On the merits they moved to dismiss upon all of the grounds urged by Souers, as above stated, and upon the additional ground, that it affirmatively appears on the face of the complaint that the claims asserted have been adjudicated against Crescent by the judgment of the District Court of the United States for the Eastern District of Louisiana, in the case of *Kohler v. McClellan, et al.*, the judgment dismissing that action having been affirmed by the court below in an opinion reported in 156 F. (2) 908.

THE DECISION OF THE COURT BELOW

In considering whether or not the district court erred in dismissing the action for failure to state a claim for relief, the court below did not confine itself to the complaint alone. It considered the records (R. 193) in four former cases: *Kohler v. McClellan,* 156 F. (2) 908; *Kohler v. Humphrey,* 174 F. (2) 946; *Tucker v. New Orleans Laundries, Inc.,* 188 F. (2) 263; and *Tucker v. National Linen Service Corp.,* 188 F. (2) 265.

Kohler v. McClellan, supra, and the two *Tucker cases, supra,* all sought relief, on Crescent's behalf, for the diversion of its stock in National, and other alleged fraudulent acts. In *Kohler v. McClellan, supra,* the suit was against directors of Crescent for many alleged frauds, including the diversion of stock of National, and damages arising from the Sheriff's sale. The court below affirmed a judgment of the district court dismissing said action as to all claims, except those arising out of the Sheriff's sale itself, upon the jurisdictional ground that an indispensable party was absent. When the case went back to the district court, Kohler amended his complaint, so as to drop Crescent as a party, and sought to recover individually, and for other stockholders, damages inflicted upon Crescent arising out of the Sheriff's sale. The district court dismissed, and the court below, in *Kohler v. Humphrey, supra,* affirmed the dismissal upon the ground, among others, that the injuries complained of were injuries to Crescent, and not to its stockholders, and that stockholders had no individual cause of action. The two *Tucker cases, supra,* are decisions affirming judgments dismissing for lack of diversity jurisdiction. Due to the

grounds of dismissal, neither of said four cases could adjudicate the merits of Crescent's claim to the common stock of National, which is sought to be enforced in this action.

The decision of the court below in the present case goes so far as to say (R. 198):

> "As pleaded in the present suit, without the evidentiary details in which the former suit abounded, the bold conclusions (of conspiracy, fraud, and collusion) might have had some support in a negative way from the failure of the pleadings to explain actions and conduct as alleged, which without explanation, might have seemed to support the charges made." (Words in parenthesis inserted for clarity.)

Then, the court below, turned to consider the pleadings in *Mrs. Tucker's former case* (R. 198), and these pleadings revealed that (R. 192): the resolution of National's stockholders of August 23, 1928, which provided for the distribution of its stock, was more fully set out in the former complaint than it is in the present complaint, and also, that "Exhibit C" to the former complaint, which is not attached to or referred to in the present complaint, showed a three party contract for the formation of National Linen Service. Without considering the allegations in the former complaint that said resolution and contract were devices adopted, pursuant to the conspiracy to defraud Crescent of said stock and to conceal the fraud, the court below decided that the district court was right in dismissing this action for failure to state a claim against the defendants, although the issues concerning the fraudulent nature of said resolution and contract were

not adjudicated against Crescent in the former case, the court below having affirmed a dismissal of that action solely upon the ground of lack of diversity jurisdiction.

The decision of the court below affirmed the judgment of the district court dismissing this action upon other grounds, as follows: (1) for want of indispensable parties (R. 197); (2) that the venue as to Souers was improper because as to him the suit was one *in personam,* and not in any sense one *in rem,* which would sustain an action on substituted service; (3) that *Kohler v. McClellan,* 156 F. (2) 908, adjudicated that Crescent's claims in respect to the distribution of the stock of National passed to the purchaser at the Sheriff's sale, and have not since been the property of Crescent; (4) that the claims have been barred by laches and by limitation.

FORMER COMPLAINT CONSIDERED BY COURT BELOW.

The record in the former action is of file in this Court, in Case No. 211, October Term, 1951, entitled *Tucker on behalf of Crescent City Laundries, Inc. v. National Linen Service Corporation, et al.,* Certiorari was denied. (Mem.) 348 U. S. 828.

To avoid confusion, references to the record in the former case will be made as (T-1, R ....).

The former complaint, with respect to conspiracy, fraud, and concealment of the fraud alleges: (T-1, R. 24) that on or before July 21, 1928, in New Orleans, Louisiana, I. M. Weinstein, J. B. Jacobs, B. C. McClellan and S. W. Souers each of whom at that time occupied a

fiduciary and confidential relationship towards either Southern Linen Supply Corporation, Laundry & Dry Cleaning Service, Inc., or Atlanta Laundries, Inc., did, then and there, conspire and agree to procure the transfer by said three corporations of all assets used by them in their linen supply businesses to a new corporation to be organized by S. W. Souers in exchange for shares of stock in said new corporation, and that they would assist each other to obtain for some of them and for other persons who might assist them in securing said assets for the new corporation, without cost, some of the shares of stock to be issued by the new corporation in payment for said assets, and that they would control and dominate the affairs of said new corporation for ten or more years after its creation so as to conceal said fraud and unjustly enrich themselves and others at the expense of Atlanta Laundries, Inc. and Laundry & Dry Cleaning Service, Inc.; that a conference was held on said date in New Orleans, at which all of said persons were present, and said S. W. Souers prepared a memorandum in his own handwriting reading as follows:

"25,000—

1,500 to I. Moss
1,500 to L.

3,000
22,000
11,000 M.C.
11,000 S.W.S.

150,000—pro. com. out of 400,000 notes & 25,000 shs. com. S.W.S.";

that (T-1, R. 25) said persons caused to be prepared and executed a typewritten memorandum at said conference, which was signed by Sidney W. Souers; Laundry & Dry Cleaning Service, Inc., B. C. McClellan, Pres.; Atlanta Laundries, Inc., B. C. McClellan; and Southern Linen Supply Corp., I. M. Weinstein, Pres., said memorandum providing (subject to ratification by the boards of the three companies) a merger of the Linen Supply business of said three companies; the basis of consolidation; the sale of debentures of $400,000 by the new corporation upon completion of the consolidation; Souers agreeing that he would underwrite this issue, subject of course, to the audit and appraisal showing earnings and value to be satisfactory; that the new corporation would authorize 20,000 shares Preferred Stock at $100. par value, and 150,000 shares of no par value Common Stock, which would be the sole voting stock, unless the dividends on the preferred stock should be in default; that "for underwriting the bonds and handling the consolidation, S. W. Souers is to receive 50,000 shares, or one-third of the common stock to be immediately issued, and the balance is to be split fifty-fifty between Mr. Weinstein and his group and Mr. B. C. McClellan and his group, including the Atlanta and New Orleans Laundry companies"; that the Common Stock was to be placed in a voting trust for a period of ten years, with the voting control running in favor of seven voting trustees, B. C. McClellan as one, and three to be selected by Southern Linen Supply, and three by Souers. The complaint further alleged (T-1, R. 29) that a duplicate original of said typewritten memorandum was sent by B. C. McClellan to the defendant Herbert J. Haas on July 23, 1928; that (T-1, R. 30)

George H. Fauss, T. A. Martin, Arthur I. May and Herbert J. Haas joined in said conspiracy on or before July 26, 1928, and caused a special meeting of the Board of Directors of Atlanta Laundries, Inc. to be held on that day which authorized a contract to be made which would provide for the sale by Southern, Atlanta, and Crescent, to a corporation to be organized by Sidney W. Souers and his associates of the towel and linen supply business, Atlanta to receive the same proportion in preferred for its volume of business, and "a portion of 50,000 shares of common stock"; that (T-1, R. 32) A. J. Weinberg joined in said conspiracy on or before July 27, 1928; that I. M. Weinstein, J. B. Jacobs, A. J. Weinberg, Sidney W. Souers, B. C. McClellan, George H. Fauss, T. A. Martin, Arthur I. May, and Herbert J. Haas caused to be prepared and executed on July 27, 1928, an agreement in writing, copy of which is attached marked "Exhibit C"; that (T-1, R. 33) C. L. Sawyer, Charles Leftwich, and W. Irving Moss joined in said conspiracy on or before August 1, 1928; that (T-1, R. 34) George W. Robertson, on or before August 4, 1928, acquired knowledge of said conspiracy and on said date discussed it with Haas over the telephone as per Haas' letter to Souers dated August 4, 1928; that (T-1, R. 36) on August 5, 1928, said conspirators acting in pursuance of said conspiracy, caused W. Irving Moss, while pretending to act in his capacity as Secretary of Crescent, *and in the absence of corporate action to the effect being recorded in the Minute Book of Crescent,* to write a letter to Sidney W. Souers, purporting to show corporate action by Crescent approving the diversion of said stock in accordance with the written memorandum prepared by Souers in his own handwriting on July

21, 1928, and the diversion of stock to officers of Atlanta Laundries, Inc., out of the stock which Atlanta was to receive; that (T-1, R. 38) in pursuance of said conspiracy said conspirators caused G. B. Tidewell, I. M. Weinstein, S. I. Golden, B. C. McClellan, George H. Fauss, J. B. Jacobs and S. W. Souers to hold a meeting as stockholders of National on August 23, 1928, in Atlanta, Georgia, and (T-1, R. 41) caused the minutes of said meeting, relating to the acquisition of assets and the stock to be issued in consideration therefor, to be recorded in the Minute Book of National Linen Service Corporation; so as to authorize the proper officers of the company to issue and deliver to or upon the order of Southern, Atlanta, and Crescent, 50,000 shares of common stock of National to Sidney W. Souers, out of the 150,000 shares of common stock authorized to be issued in payment for the properties conveyed to National by Southern, Atlanta, and Crescent; that (T-1, R. 48) on or before August 23, 1928, Max N. Kohler, T. A. Martin, George W. Robertson and Leon D. Hubert joined in said conspiracy to defraud and to conceal the same, and pursuant thereto they were on the date mentioned elected directors of National Linen Service Corporation; that (T-1, R. 60) said conspirators, in furtherance of said conspiracy to defraud and to conceal said fraud, withheld from Crescent knowledge of the full terms of the memorandum agreement of July 21, 1928, and of the full terms of the expanded agreement of July 27, 1928, and of the true consideration paid by National for said assets, and no officer of said corporation had knowledge of said facts except those who were participating in the fraudulent diversion of said assets and the consideration paid therefor; that (T-1, R.

99) the officers of Crescent, named as conspirators herein, fraudulently concealed from Crescent the following material facts, which they were under the duty to disclose: (a) The terms of the memorandum agreement of July 21, 1928; (b) the terms of the expanded agreement of July 27, 1928, hereto attached as "Exhibit C"; (c) that each of said conspirators were to receive shares of common stock or voting trust certificates for shares of common stock of National without paying any consideration therefor; (d) that each of said conspirators did receive and retain secret profits from the transfer of the assets used by Crescent in its linen supply business to National Linen Service Corporation, in the form of voting trust certificates for shares of common stock of National, without paying anything therefor; and (e) the terms of the stockholders resolution of National of August 23, 1928; and (T-1, R. 78) that the expanded agreement of July 27, 1928, hereto attached as "Exhibit C," insofar as it provides that Sidney W. Souers and/or his nominees should receive 50,000 shares of the common stock of the new corporation upon its organization without paying any consideration therefor, was and is invalid as to Crescent for the following reasons: (a) Crescent did not authorize the execution of said "Exhibit C" in its behalf; (b) said "Exhibit C" was not ratified by Crescent; (c) each of said conspirators who caused the execution of "Exhibit C" knew that B. C. McClellan was the only officer of Crescent who purported to act for it in the making of said agreement, and each of said conspirators knew that B. C. McClellan was to be one of the nominees of Sidney W. Souers to receive a portion of said 50,000 shares of common stock and thereby make a profit for himself at the expense of

Crescent; (d) said conspirators knew that the only officers who purported to act for Atlanta Laundries, Inc. in the execution of said agreement were B. C. McClellan, Sidney W. Souers, George H. Fauss and Herbert J. Haas, and each of said conspirators knew that B. C. McClellan, Souers, Fauss and Haas were to be nominees of Sidney W. Souers to receive a portion of said 50,000 shares of common stock which they had conspired to divert from Atlanta and Crescent, and thereby to make a personal profit for themselves at the expense of Atlanta whose interest they had in charge; (e) said portion of said agreement was and is invalid, under the facts herein alleged, because it is against the public policy of securing the faithful discharge of duties by persons holding positions of trust and confidence, in that, it tended to cause unfaithful conduct by fiduciaries and was, in effect, an agreement to wrong or defraud Atlanta and Crescent, whose interests said fiduciaries had in charge; and (f) it was designed to obtain an unfair advantage of Atlanta and Crescent by diverting said 50,000 shares of stock from them to the nominees of Souers, and the same were received by said officers of Atlanta and Crescent, without any corporate knowledge on the part of Atlanta or Crescent, and without the knowledge of any officer of said corporations, or either of them, other than those officers who engaged in said conspiracy to divert said shares of stock and who received the same; that (T-1, R. 85) Southern Linen Supply Corporation accepted as its portion of said 150,000 shares 50,000 shares, and Voting Trust Certificates for said 50,000 shares were issued to its stockholders upon its instructions on May 22, 1929, leaving 100,000 shares to be divided between Atlanta and Cres-

cent, and they were entitled to have voting trust certificates in their favor for said 100,000 shares; that there was never any corporate action by Crescent specifying what portion of said 100,000 shares was to go to Atlanta, and there was never any corporate action by Atlanta specifying what portion of said 100,000 shares was to go to Crescent; and that there was never any corporate action by Atlanta or Crescent authorizing said trustees to issue voting trust certificates for any portion of said 100,000 shares of common stock to any other persons, and neither of said corporations ever consented to the diversion of any of said shares.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

Petitioner intends to urge the errors assigned in the petition that the court below erred in the following respects:

1. In affirming the judgment of the district court.

2. In making misstatements of material and controlling facts, contrary to the record, with respect to what the minutes of Crescent showed as alleged in the complaint, upon which misstatements of facts it based its decision and judgment that what was done was spread upon the records at the time, and there was no concealment of the fraud.

3. In arbitrarily holding that the district court is without jurisdiction to enter a decree in this action re-

quiring National Linen Service Corporation to issue to Crescent a certificate for 487,683 shares of the common stock of National, which has at all times been owned by Crescent, and which was wrongfully and fraudulently transferred to a third person by National, unless plaintiff shall first bring before the court all of such third persons to whom National issued certificates for portions of said stock; there being no demand for equitable relief by way of cancellation of certificates standing in the names of such third persons not sued.

4. In arbitrarily holding that an exhibit attached to a complaint in a former action between the parties could be considered as evidence, under the doctrine of judicial notice, of the existence of a valid contract entitling Souers to receive 50,000 shares of common stock of National, notwithstanding that the former complaint to which said exhibit was attached alleged that the contract shown by said exhibit was fraudulently made contrary to public policy and was void because executed by officers of two corporations pursuant to a conspiracy to defraud said corporations, in breach of their duties to said corporations, and for the purpose of obtaining secret profits for themselves at the expense of said corporations, in a transaction involving the business of said corporations whose interest they were in duty bound to protect, and this issue as to the validity or invalidity of said contract was left undetermined because the case was dismissed for lack of diversity jurisdiction.

5. In arbitrarily construing the action as being one *in personam* as to the defendant S. W. Souers.

6. In holding that its decision and judgment in *Kohler v. McClellan,* 156 F. (2) 908, affirming the judgment of dismissal of the District Court of the United States for the Eastern District of Louisiana in the case of *Kohler v. McClellan, et al.,* being Civil Action No. 753, constitutes a bar to this action.

7. In holding that this action has been barred by laches and limitation.

8. In holding that it had determined in *Kohler v. McClellan,* 156 F. (2) 908, that the claims or causes of action of Crescent in respect of the distribution of the common stock of National passed to the purchaser at the Sheriff's sale, and have not since been the property of Crescent.

9. In holding that the claims or causes of action of Crescent in respect of the distribution of the common stock of National were seized by the Civil Sheriff of Orleans Parish, Louisiana, on June 2, 1942, and that title to said claims passed to the purchaser at the Sheriff's sale held on July 9, 1942, and have not since been the property of Crescent.

10. In misstating the facts shown by the record in this case and by the record in the former *Tucker case,* and in basing its decision and judgment on the following misstatement of facts:

> "As to the claims made in this suit for the 50,000 shares which were issued to Souers, no reason whatever for impeaching the arrangement by which

Souers was to receive these shares for his services was shown."

ARGUMENT AND CITATION OF AUTHORITIES.

Preceding this argument we have sought to give a summary, as brief in each instance as possible, of the complaint, the motions to dismiss, the decision below, and of those parts of the former complaint filed by Mrs. Tucker, which was considered by the court below in its decision, which we feel are material to a clear understanding of the errors alleged to have been committed.

PATENT MISSTATEMENTS OF FACTS BY THE COURT BELOW.

Paragraphs 54 and 56 (R. 27, 29) of the complaint allege in effect that no information was contained in the Minute Book of Crescent in respect to the certificate for 27,735 shares of stock prior to the discovery of the fraud on December 3, 1941 and that the issuance of said certificate for 27,735 shares was concealed from Crescent from 1928 to 1941.

The court below misstated said facts as follows (R. 200):

> "The pleadings will be searched in vain to find any basis for the claim that the number of shares distributed to and accepted by Crescent was secret

and kept so. Its minutes showed: that 27,735 shares were first issued to it; that it surrendered this certificate and accepted a new certificate for 23,548 shares; and that the 4,187 shares surrendered were issued to McClellan."

Paragraphs 25(b) and (c), 26(b), 26(d), 26(e), 54 and 56, *supra*, 70, 72, 181 and 172 (R. 13, 15-17, 27, 29, 32, 33 and 78) of the present complaint allege that a conspiracy and agreement was entered into and executed, by the the defendants and others, to defraud Crescent out of said 54,187 shares of stock and to conceal the execution of said fraud from Crescent.

Paragraphs 46 (T-1, R. 36), 155 (T-1, R. 99) and 156 (R. 221) of Mrs. Tucker's former complaint allege in detail the facts of the fraud which were concealed from Crescent.

The court below erroneously found to the contrary, as follows (R. 199):

"x x x What was done was spread upon the records at the time, and there was no concealment. x x x"

Paragraphs 111 and 116 (T-1, R. 78, 83) of Mrs. Tucker's former complaint (R. 212-216) allege many valid reasons for impeaching the arrangement by which Souers was to receive the 50,000 shares of stock claimed in this action, but the court below found contrary to said allegations, and based its decision and judgment, with respect to said 50,000 shares, upon the following misstatement of facts (R. 200):

"As to the claims made in this suit for the 50,000 shares which were issued to Souers, no reason whatever for impeaching the arrangement by which Souers

was to receive these shares for his services was shown."

The arrangement by which Souers was to receive the 50,000 shares of stock claimed in this action is the agreement of July 27, 1928, which was attached to the former complaint filed by Mrs. Tucker, and marked "Exhibit C", (T-1, R. 232). It is not referred to in the complaint in this action and does not form any basis for the claims asserted on behalf of Crescent herein.

The former complaint (T-1, R. 78) alleged that the agreement of July 27, 1928, attached thereto as "Exhibit C," insofar as it provides that Sidney W. Souers and/or his nominees were to receive 50,000 shares of the common stock of the new corporation upon its organization without paying any consideration therefor, was and is invalid as to Crescent for many specific reasons, among them being that Crescent never authorized or ratified the execution of said agreement on its behalf, and further, that said agreement was executed by fiduciaries of Crescent and Atlanta for the purpose of defrauding said corporations whose interests they were duty bound to protect, in receiving and retaining shares out of said 50,000 shares of stock, as secret profits for themselves, at the expense of said corporations.

In considering a motion to dismiss every properly pleaded allegation of fact must be taken as true. *Polk Co. v. Glover,* 305 U. S. 5; *Gibbs v. Buck,* 307 U. S. 66; *Land v. Dollar,* 330 U. S. 731, 735. A court may notice its own records and consider as evidence any fact which such records show to have been adjudicated. But, *Bienville v.*

City of Mobile, 186 U. S. 212, cited by the court below, does not authorize the courts to notice anything in their records except facts or principles of law which have been *adjudicated.*

The former *Tucker case* was dismissed by the district court and the court below affirmed the dismissal solely on the ground of lack of diversity of citizenship jurisdiction. *Tucker v. National Linen Service Corporation, 188 F. (2) 265. Certiorari denied. 348 U. S. 828.* The issue as to the alleged invalidity of said agreement of July 27, 1928 not having been adjudicated, the court below erred in holding in this case that said contract entitled Souers to receive the 50,000 shares of stock. If Souers claims any right under the agreement he can plead it in defense of the action.

Where the object or tendency of a contract is to constitute a breach of duty on the part of one who stands in a confidential or fiduciary relation, it is illegal and void, as tending to be, or being a fraud on third persons *Meguire v. Corwin,* 101 U. S. 108; *Forsyth v. Woods,* 11 Wall 484, 485. Not only are such agreements illegal because against the public policy of securing faithful discharge of duties by persons holding positions of trust and confidence, they are illegal because they are, in effect, agreements to wrong or defraud persons whose interest the fiduciaries have in charge; *Maine Northwest Development Co. v. Northern Commercial Co.,* 213 F. 103; and contracts which tend to induce an officer of a corporation to act unlawfully or in disregard of the interests of the corporation, are

of this nature and void. *Wardell v. Union Pacific R. Co.*, 103 U. S. 651.

NO INDISPENSABLE PARTIES ARE ABSENT.

The first count of the complaint in this action alleges that the defendant National Linen Service Corporation (R. 14, 17, 27) entered into a conspiracy in 1928 with the Voting Trustees named in Exhibit "A" (R. 88), and with certain officers of Crescent and Atlanta, and with other persons, to defraud Crescent out of 54,187 original shares (now represented by 487,683 shares) of the common stock of National, and to conceal said fraud. It alleges the execution of said conspiracy (R. 14) and claims that Crescent is still the equitable owner of said stock (R. 77), and for relief demands: (a), (b), (c), (R. 81) an accounting for dividends paid on said shares and judgment for the amount, with interest, in favor of Crescent and against all the defendants except Souers and Southern; (o), (R. 87) that National be compelled to issue to Crescent a certificate for said shares, or, (p) (R. 176) in the alternative, a judgment in favor of Crescent against all the defendants, except Souers and Southern, for the highest market value of said shares attained between November 16, 1928 and the date of said judgment.

Other relief demanded (h), (i), (j), (k), (1), (m), (n) (R.84) as to Haas, Martin, and the executor of Fauss is that a constructive trust in favor of Crescent be impressed upon the shares of stock now standing

in the name of each on the books of National, that they account for the dividends which they have received on all shares fraudulently acquired, and that they be required to surrender the certificates for stock now held by them for cancellation, or if said shares have been sold that Crescent have a judgment for the proceeds plus interest.

The only relief demanded as to Souers (g) (R.84) is that the court impress a constructive trust in favor of Crescent upon the shares of stock standing in his name on the books of National.

The decision of the court below in holding that the district court was right in dismissing this action for want of indispensable parties, whose presence is required to give the court jurisdiction to grant the equitable relief sought, is error. Such holding is based upon the *false assumption* that the complant in this action seeks (R.197):

> "the equitable relief of cancellation and its incident an accounting, as to certificates of stock now standing in the names of persons who are not, and cannot be made, parties to the suit without destroying diversity jurisdiction."

The complaint will be searched in vain to find such a demand for relief. The only demand by way of cancellation and its incident an accounting, is against certificates of stock now standing in the names of parties who are before the Court.

The complaint demands that National be compelled to issue a certificate to Crescent for 487,683 shares of stock, based upon the charge that Crescent has always been the owner of said stock, and that National conspired with others to defraud Crescent of said stock and to conceal the fraud, and wrongfully transferred said stock to third persons, who received the certificate issued to them without paying any consideration for said certificates, and that all of this was done without Crescent's consent. Such relief may be granted against National upon proof of said charges without the presence of any of the persons holding certificates for shares of said stock.

In *St. Romes v. Levee Cotton-Press Co.*, 127 U. S. 614, this Court *held:*

> "If a corporation has, by negligence, cancelled a person's stock, and issued certificates therefor to a third party, who has purchased it from one not authorized to sell it, the true owner is not bound to pursue such purchaser, but may call upon the corporation to do him justice by replacing his stock or paying him its value."

To the same effect is *Mackenzie v. Englehard Co.*, 266 U. S. 131, at page 144, and there is no decision to the contrary.

The defendants against whom relief is sought in this action are charged with being joint tort feasors with the absent certificate holders in the conspiracy to defraud Crescent of said stock and to conceal the fraud.

Section 105-1207 of the Georgia Code provides:

> "In all cases he who maliciously procures an injury to be done to another, whether it is an actionable wrong or a breach of contract, is a joint wrongdoer and may be sued either alone or jointly with the actor."

Crescent has the right to proceed against one or any number of said joint tort feasors, and the failure to hold any one of them liable will not release the others. *Bigelow v. Old Dominion C. Min. & S. Co.*, 225 U. S. 111; *Iselin v. C. W. Hunter Co.*, (C.A.5) 173 F(2) 388; *Mashburn v. Dannenberg*, 117 Ga. 567 (13); *Wall v. Wall*, 176 Ga. 757 (1)(5).

The absence from this case of the non-resident holders of certificates for some of said 487,683 shares of stock does not prevent the court from entering a decree for an accounting against the defendants from whom an accounting is sought, nor from cancelling certificates for stock issued in the names of defendants who are before the court, said non-residents having no interest in the shares of stock represented by the certificates issued in the name of some of the defendants, and which are sought to be cancelled.

AS TO SOUERS THE ACTION IS QUASI IN REM.

The complaint seeks to recover personal property within the district consisting of 487,683 shares of

stock, and to impress a constructive trust in favor of Crescent upon 54,000 shares of said stock which now stands in the name of Souers, a non-inhabitant of the State of Georgia, upon the books of the issuing corporation which is domiciled in the district. No personal judgment is sought against Souers. The court below erred in holding that the action as to Souers was one *in personam* which could not be sustained against a non-inhabitant of the State on substituted service under Section 1655, Title 28, U. S. C., and that the district court could not enter a decree compelling National, a corporation subject personally to the jurisdiction of the district court, to cancel such certificates held by Souers and regard Crescent as the owner of the property interest represented by said certificates.

This Court decided to the contrary in the case of *Jellinik v. Huron Copper Mining Co.*, 177 U. S. 1, at pages 13 and 14, and this decision has been consistently adhered to in all subsequent decisions of this Court.

CRESCENT NOT DIVESTED OF ITS CLAIMS AGAINST DEFENDANTS BY SHERIFF'S SALE.

The 6th, 8th, and 9th, specifications of error are all dependant upon the bearing which the decision of the court below in *Kohler v. McClellan*, 156 F(2) 908, has upon the assertion of Crescent's claims in this action.

The court below erred in affirming the judgment of the district court for the second reason which it assigned for its judgment, to-wit (R. 199):

> "The second of these reasons is that, as determined by us in the *Kohler case, supra,* the first of the suits brought on Crescent's behalf, the claims or causes of action of Crescent in respect of the distribution of the common stock of National passed to the purchaser at the Shariff's sale and have not since been the property of Crescent."

Upon what legal theory the judgment in the *Kohler case, supra,* requires the affirmance of the dismissal of this action, the decision of the court below fails to state.

None of the defendants sued in this action were served as a party or appeared in the *Kohler case, supra.* None of the defendants claim to have been in privity with any of the parties in that case. Privity never exists between joint tort feasors.

All of the sound reasons why one joint tort feasor can have no benefit of a judgment rendered in favor of another joint tort feasor in an action by the injured party, based upon the same facts, is covered by the opinion of this court in *Bigelow v. Old Dominion Copper Min. & S. Co. supra,* at page 132 of 225 U. S. where this court concludes:

> "If Lewisohn and Bigelow were severally liable and a judgment against one, without full satisfaction, was not a bar to a suit against the other, it is difficult to see why a failure to obtain a

> judgment against one should be an answer to a suit against the other, who was not a party to the first suit. That a failure to recover in one suit against one such tort feasor is not a bar to a suit in the courts of another state against another, who was not a party to the first suit, seems to be supported by considerations of justice and the weight of authority."

Even if the court below is correct in now saying in effect that it assumed jurdisdiction in the *Kohler case, supra,* to determine, and did determine, that Crescent's claims in respect of the distribution of the common stock of National passed to the purchaser at the Sheriff's sale and have not since been the property of Crescent, notwithstanding the absence from that case of a person whom the court said was an indispensable party without whose presence the district court could not adjudicate said claims, its determination was error.

This is true because it determines that title to said claims were divested out of Crescent at a Sheriff's sale conducted in Louisiana based upon a seizure made under an execution against Crescent, where the return of the seizure by the Sheriff purporting to show the seizure of claims which Crescent had against other persons, stated in Item 37 (R. 140):

> "All the Debtor's other choses in action and claims of any and every character against any and all persons whomsoever, whether or not show upon the books of the Debtor, and all the Debtor's

> cash and other assets and effects of every name, character and description."

It is impossible to identify any of the defendants as being among the unnamed persons referred to in said Item 37.

The court below stated in the *Kohler case* at page 910 of 156 F(2):

> "As between the parties to the sale, Crescent and purchaser, where it was purposed to seize and sell all assets, a general description broad enough to cover all assets was sufficient."

Each of the Louisiana decisions cited by the court below in support of its said ruling, viz., *Saucier v. Crichton,* 5 Cir., 1945, 147 F(2) 430; *United Gas Public Service Co. v. Mitchell,* 188 La. 651, 177 So. 697, 698, and *Daigle v. Calsasieu Nat. Bank in St. Charles,* 200 La. 1006, 9 So. (2) 394, 396, dealt with a *voluntary* conveyance.

The error committed by the court below in the *Kohler case, supra,* where the validity of an execution sale was challenged for insufficiency of the description of the property sold, was its failure to apply the applicable decisions of the Supreme Court of Louisiana requiring that in such *involuntary* execution sales, a specific description of the property seized must be incorporated in the seizure and advertisement in order to divest title to the property out of the execution debtor at such a sale.

The decisions of the Supreme Court of Louisiana are uniform to the extent that they are *stare decisis* upon the point that title can not pass out of the debtor at a judicial sale where there is a vague and indefinite description of the thing, i. e., where the description given is one from which no person could identify the thing purported to be sold. To this effect are the decisions in *McGary v. Dunn,* 1. La. Ann. 338; *Gales v. Christy, Assignee,* 4 La. Ann. 293; *Dearmond v. Courtney,* 12 La. Ann. 251; *Pickersgill v. Brown,* 7 La. 304; and *Mullin v. Jones,* 153 La. 1091, 73 So. 202. In the case last cited the Louisiana court, at page 203 of 73 So., reaffirmed the principle which it laid down in *Pickersgill v. Brown, supra,* where it said:

> "In judicial sales there must be a description of the thing sold. The law will not countenance their being made lotteries at the bidding, and sources of confusion and strife afterward."

The reason why the rule as to *involuntary* execution sales is different from the rule as to *voluntary* sales is best stated in the case of *Millsap v. Peoples,* 116 Texas 180, 218 S. W. 181, 182, as follows:

> "The presumption sometimes indulged, in *voluntary* sales, in aid of the description or identity of the property conveyed, based on the supposed intention of the grantor, has no application to an *involuntary execution sale,* where the owner intends nothing with respect to the matter. The law in such case *acts in hostility to the owner,* and no presumptions of intention can be summoned in aid or enlargement of the otherwise defective or insufficient instrument." (Emphasis supplied.)

To the same effect: *Nelson v. Brodhack,* 44 Mo. 596, 100 Ann. Dec. 328; and *Ault v. Clark,* (Indiana) 112 N. E. 843, 844 (9).

The decisions of Louisiana that a sheriff can convey no title out of the debtor to claims against *named* persons at execution sale unless the nature of the claims is so stated as to give bidders a clue to their value, the sheriff, at the sale of July 9, 1942, did not convey title out of Crescent to claims against *nameless* persons who were referred to in the purported description in the seizure as

> "any and all persons whomsoever, whether or not shown on the books of the Debtor."

The court below erred in deciding in this case that the claims or causes of action of Crescent in respect of the distribution of the common stock of National passed to purchaser at the Sheriff's sale of July 9, 1942 and have not since been the property of Crescent, said decision of this important question of local law of Louisiana being in conflict with said applicable Louisiana decisions.

COURT BELOW ERRED IN HOLDING ACTION BARRED BY LACHES AND LIMITATION.

As its third reason for affirming the judgment of the district court the court below said (R. 199):

> "The third reason it that, if the two reasons first given are incorrect, it is still true that, be-

> cause of the great lapse of time and great changes in circumstances, since the claimed causes of action arose, including therein the great depression of the thirties, the great changes in value, the deaths of many of the witnesses, and because what was done was spread upon the records at the time, and there was no concealment, the claims have long been barred by laches and limitation."

It is alleged in the complaint that (R. 80) Crescent is now, and has been at all times since the commission of the fraud, under the control of directors and stockholders whose interests are antagonistic to the interest of Crescent, with respect to the enforcement of the claims herein asserted on its behalf. A majority of its directors and a majority of its stockholders became majority directors and majority stockholders of New Orleans Laundries, Inc., which took over Crescent's assets sold at the Sheriff's sale, which former corporation, the defendants' assert, owns the claims here asserted against them.

Under these circumstances Crescent can not be charged with delay since it was helpless to bring this action itself. The records considered by the court below show that its stockholders have been diligent in seeking a remedy on its behalf.

In *Liken v. Shaffer,* (D. C. Iowa) 64 F. Supp. 432, 442, the court held:

> "Where a claim is asserted in behalf of a corporation in a stockholder's derivative action in

> order for matters to be a *bar* to the claim, they must be such matters as relate to the corporation itself, and the conduct of the particular stockholder is not material . . . *Laches* to be a matter of *bar* must be the *laches* of the corporation itself . . . The knowledge or lack of knowledge of an individual stockholder not connected with the corporation other than as a stockholder is not material in considering the *Statute of Limitations* as a bar to the claim of the corporation itself. In such situation it is the knowledge or lack of knowledge of those connected with the corporation whose knowledge is by law imputed to the corporation. Where those whose knowledge is ordinarily imputed to the corporation are the *wrongdoers* and they are in control of the corporation, the *statute of limitations* may be suspended until that situation is *changed.*" (Emphasis supplied.)

In *Bates Street Shirt Co. v. Waite,* (Me) 156 Atl. 293, the Supreme Court of Maine, in a stockholder's derivative action, held:

> "(3) Limitation statute did not begin to run on action against corporation's directors for alleged conversion of corporation's money, while directors controlled corporation."

We have been unable to find any other decisions upon this point, but the rules of justice and equity would seem to demand that so long as the injured corporation remains in the control of the wrongdoers, both the corporation and its stockholders, in a stockholder's derivative action on its behalf, should be

excused for delay occasioned only by the failure of the stockholders to pursue the proper remedy to redress corporate wrong where they have diligently sought such redress through the courts.

In *Southern Pacific Co. v. Bogert,* 250 U. S. 483, where there was a delay over 22 years upon the part of minority shareholders in seeking to affix a trust on shares in a new corporation held by the majority, and plaintiffs or others representing them as a class, had been diligent in attacking the proceedings through which such shares were acquired, this court *held:*

> "Long failure to discover the appropriate remedy, though well known, does not establish laches if there has been due diligence and the delay has not prejudiced the defendants."

This court, in *Russell v. Todd,* 309 U. S. 280, in Note 1, page 288, said:

> "Time has been held to be no bar to an equitable suit for a trustee's accounting . . . Federal courts of equity have not considered themselves obligated to apply local statutes of limitations when they conflict with equitable principles, as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant."

The deaths of four witnesses is insufficient reason for sustaining a plea of laches, where most of the principle actors in the fraud are still alive. Those who are dead had ample notice before their deaths of the

charges of fraud which were being made against them. All the records are available. The evidence is largely in writing. Herbert J. Hass died since the decision in the court below. All the remaining defendants are alive and active in business; facts which the court below did not consider.

The great depression of the thirties had expired before the fraud was discovered and could in no way be said to have any bearing upon the defense of laches.

The great increase in value of the trust property is insufficient reason for sustaining the plea of laches. The increase is a part of the trust. It is the fruits of the trust and becomes subject to the trust. *United States v. Dunn,* 268 U. S. 121, 132; *Sibley v. Crawford Cotton Mills Co.,* 179 Ga. 79, 84.

The reasons given by the court below for holding that the action is barred by laches have no support in the principles of equity, and such ruling is error.

The Georgia limitation statutes, applicable to actions of this character, are *Sections 3-709 and 3-807 of the Code of Georgia,* reading as follows:

> "Section 3-709. All actions against executors, adminstrators, guardians, or trustees, except on their bonds, shall be brought within 10 years after the right of action shall have accrued.
>
> "Section 3-807. If the defendant, or those under whom he claims, shall have been guilty of a fraud by which the plaintiff shall have been debarred or

deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud."

The fraud upon Crescent by a majority of its directors, in conspiracy with the defendants charged with participation in the fraud, is certainly a fraud which both *debarred* and *deterred* action by Crescent.

Silence on the part of fiduciaries under a duty to speak, or their failure to disclose what they ought to disclose, is as much a fraud in law as an actual affirmative false representation. *Morris v. Johnstone,* 172 Ga. 598, 605.

The ten year statute applies to constructive trusts. *O'Neal v. O'Neal,* 176 Ga. 418 (2, 3,); *Grant v. Hart,* 192 Ga. 153, 156 (8).

The defendant, National Linen Service Corporation, occupied a fiduciary relation toward Crescent as one of its stockholders, and owed Crescent the duty not to transfer stock owned by Crescent to other persons who were trustees of Crescent, without Crescent's consent. *Fletcher Cyclopedia Corporations,* Perm. Ed. Vol. 12, Sections 5538, 5546 and 5552.

The rule applicable to the conduct of the defendant National in this case, is stated in *Daily v. Universal Oil Products Co.,* 76 F. Supp. 349 (18) as follows:

"A corporation, that has actual or constructive knowledge of an equitable interest of a third party

in its stock then standing in the name of a trustee, cannot permit a transfer in violation of trust."

In *Clark & Wilson Lumber Co. v. McAllister*, (C. C. A. 9) 101 F(2) 709, in a case involving facts similar to the facts in this case, the court said:

> "Where corporation conveyed its property and assets to defendant corporation in exchange for defendant's capital stock and subsequently president and director of transferror corporation caused some of stock to be transferred on books of defendant corporation in name of himself, his wife and another director, it was duty of defendant corporation to investigate whether director had special authority to make such transfers."

Sections 108-423 and 108-425 of the Code of Georgia are as follows:

> "108-423. All persons aiding and assisting trustees of any character, with a knowledge of their misconduct, in misapplying assets, are directly accountable to the person injured.
>
> "108-425. When assets are misapplied and can be traced in the hands of persons affected with notice of the misapplication, the trust shall attach to the assets, and equity will aid in restoring them to their legitimate purposes."

This suit havng been filed within ten years from the date of the discovery of the fraud, and being an action seeking relief against trustees, the court below erred in holding that it is barred by limitation.

PUBLIC IMPORTANCE OF THE ISSUES.

The issues here involved are of great public importance.

This Court, since its decision in ~~Davenport v. Dows,~~ DODGE V. WOOLSEY, 18 ~~Wall. 626,~~ HOW. 331 has steadfastly adhered to the equitable principle that the public interest requires that minority stockholders be protected against fraud by unfaithful officers in breach of fiduciary duty.

The Congress has sought to enable federal courts to more effectively enforce this public policy. It has passed statutes permitting minority stockholders to bring derivative actions in any judicial district where the injured corporation might have sued the same defendants. *Section 1401, Title 28, U. S. C.* It also provided for extraterritorial service of process upon an indispensable party to such actions, the injured corporation. *Section 1695, Title 28, U. S. C.*

Prior to the enactment of these statutes by Congress, the existence of diversity of citizenship between the injured corporation and the wrongdoers, practically precluded the enforcement of corporate rights by minority stockholders and furnished almost complete immunity to unfaithful corporate managers and their confederates who stripped it of its assets through fraudulent breaches of truth. *Lavin v. Lavin, 180 F (2) 870.*

In the instant case no relief is available against the defendants in the Georgia courts, because Crescent

can not be served in Georgia. If this action shall fail the defendant wrongdoers will be granted immunity and there will be a complete failure of justice.

The wise public policy adopted by this Court and supported by Congress in this regard should not be sabotaged by the decision of an inferior tribunal which: makes patent misstatements of the facts in the records, misconstrues the nature of the action as to a defendant, misapplies the rule as to indispensable parties, makes a reckless misapplication of the doctrine of *res judicata,* and is without any support in the established rules of law and equity.

It is most vital to the preservation of the public interest and the general walfare that this Court shall never reach the point where it becomes too busy to exercise its power of supervision over inferior tribunals, when such tribunals allow the conscience of equity to become so calloused as to close its eyes to wholesale breaches of trust by fiduciaries.

This Court should exercise its power of supervision in this case because the decision of the court below has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this power. In so doing this Court will restore to inferior tribunals that high degree of good conscience so essential to the enforcement of the declared policy of this Court and the Congress in cases of this character; a degree of good conscience such as was expressed by the court below more than thirty years ago in

American Creosote Works v. Powell, 298 F. 418, 422, where the court said:

> "When it appears that transactions have occurred in which a trustee is dealing with himself, the courts are always intent on finding ways to defeat, rather than sustain, such transactions."

CONCLUSION.

The Petition for Certiorari should be granted in order that this Court may review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted]97

MRS. ODILE V. HUBERT TUCKER, as a Stockholder, On Behalf of Crescent City Laundries, Inc., Petitioner,

v.

NATIONAL LINEN SERVICE CORPORATION et al., Respondents.

BRIEF

On Behalf of Respondents, National Linen Service Corporation, I. M. Weinstein, J. B. Jacobs and A. J. Weinberg, in Opposition to Petition for Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 835.

MRS. ODILE V. HUBERT TUCKER, as a Stockholder, On Behalf of Crescent City Laundries, Inc., Petitioner,

v.

NATIONAL LINEN SERVICE CORPORATION et al., Respondents.

BRIEF

On Behalf of Respondents, National Linen Service Corporation, I. M. Weinstein, J. B. Jacobs and A. J. Weinberg, in Opposition to Petition for Certiorari.

These respondents say the writ should not be granted, because:

1. The petition presents no question of general public interest.

2. Previous adjudications of the District Court and the Court of Appeals have adjudicated every question assigned as error. Three times this Court has denied certiorari.[1]

1 Kohler v. Humphrey, Executor of McClellan, 329 U. S. 781; Tucker v. New Orleans Laundries, Inc., 342 U. S. 828; Tucker v. National Linen Service Corporation, 342 U. S. 828.

3. This being a derivative action, plaintiff was concluded by the previous judgment against another stockholder asserting the same cause of action and her arguments in the court below and here to the contrary are without substance.

4. The record affirmatively shows an absence of indispensable parties.

5. The complaint fails to state a cause of action upon which recovery could be had.

6. The action is barred by the statute of limitations and laches.

7. This court will not grant a writ of certiorari to determine whether the courts below properly construed the complaint or weighed the allegations of fact where the District Court decisions have been several times affirmed by the Court of Appeals.

PRELIMINARY STATEMENT OF THE CASE.

Since this is the fifth case involving the same matters in controversy[2], and since both the Court of Appeals and the petitioner herein refer to earlier chapters of the same litigation, we adopt the same identification. The first of these stockholders' derivative cases will be referred to as the **Kohler** case, the first case between these parties will be referred to as the first **Tucker** case and the second and present case will be referred to as the second **Tucker** case.

In the main the complaint is based generally upon two separate transactions, both alleged to be fraudulent. The

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2 The opinions in the others in order of sequence are reported as follows: **Kohler v. McClellan,** 156 F. (2d) 908 (C. C. A. 5th, 1946); **Kohler v. Humphrey,** 174 F. (2d) 946 (C. C. A. 5th, 1949); **Tucker v. New Orleans Laundries, Inc.,** 188 F. (2d) 263 (C. C. A. 5th, 1951); **Tucker v. National Linen Service Corporation,** 188 F. (2d) 265 (C. C. A. 5th, 1951).

first is a transaction whereby the linen service business belonging to Crescent City Laundries, Inc., was transferred to National Linen Service Corporation. Concerning that, it was charged in all of the cases that Crescent City Laundries, Inc., received less of the common stock of National Linen Service Corporation than it was entitled to receive due to fraudulent conduct on the part of numerous persons. That transaction was completed in 1928.

Throughout all of the cases, including this one, runs the second transaction. It is charged that a sale of all of Crescent's assets by the Louisiana sheriff in July, 1942, pursuant to a judgment rendered in a court of competent jurisdiction against Crescent in a suit to recover on a defaulted bond issue, was fraudulent for various reasons and that the levy made by the sheriff did not include the rights of action the plaintiff asserted (R. pp. 395-396, Case No. 211, October Term, 1951). The parties to the judgment and sale were not parties here though an unsuccessful effort was made to make them parties in the first **Tucker** case.

In the present record many of the allegations in the first **Tucker** case are omitted. The number of shares alleged to have been diverted is 54,187. The record in this case (R. 18-19, par. 27) clearly discloses that 50,000 shares were distributed to Sidney W. Souers and associates (R. 195), and 4,187 shares to Byron C. McClellan. The Executor of McClellan was not a party to this case.[3]

A full statement of the entire controversy and an analysis of the pleadings of all of the cases appears in the opinion of the Court of Appeals now under review (R. 187-200) and to this opinion the Court is respectfully referred for a more complete statement of the controversy.

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[3] Four voting trustees, including McClellan, residing in New Orleans, authorized the issuance of 4,187 shares to McClellan. These defendants in no wise participated in this transaction nor received any of the stock.

SUMMARY STATEMENT OF THE QUESTIONS INVOLVED.

In a stockholders' derivative suit brought in behalf of Crescent City Laundries, Inc., by the present plaintiff stockholder, are the rulings and decisions made in earlier cases brought by another stockholder as well as earlier cases brought by this plaintiff, binding and conclusive upon this plaintiff?

Will this Court review a holding by the court below determining that the complaint does not set out a cause of action for relief against these defendants?

BRIEF AND ARGUMENT.

1. **The Petition Does Not Present Any Question of General Public Interest, It Merely Represents an Effort to Obtain a Retrial on Matters Several Times Decided Adversely to Petitioner.**

This point does not deserve elaboration. The record affirmatively discloses that petitioner is seeking only a further review and retrial of matters many times decided against the corporation and against this plaintiff.

2. **It Has Several Times Been Decided That Crescent City Laundries, Inc., in Whose Behalf the Plaintiff Sues, Did Not Have Title to the Cause of Action Asserted.**

This was clearly ruled in the **Kohler** case, **Kohler v. McClellan,** 156 F. (2d) 908, certiorari denied 329 U. S. 781, and the cases to which this plaintiff was a party, **Tucker v. New Orleans Laundries, Inc.,** 188 F. (2d) 263, certiorari denied 342 U. S. 828, and **Tucker v. National Linen Service Corporation,** 92 F. Sup. 502, affirmed 188 F. (2d) 265, certiorari denied 342 U. S. 828. While the decision in the first **Tucker** case affirmed a dismissal for lack of jurisdiction, the court deemed it proper to repeat what it had said in the **Kohler** case and we quote:

> "The original and supplemental petition make it plain that on July 9, 1942, 'all of the debtor's (Crescent's) choses in action **and claims of any and every character against any and all persons whomsoever,** whether or not shown upon the books of the debtors, and all of the debtor's cash, assets and effects of every name, character and description' were sold at public outcry by the civil sheriff of Orleans Parish, Louisiana, under a writ of fieri facias issued upon a money judgment against Crescent; that an attorney at law in New Orleans bought in the properties at the auction sale and transferred them to N. O. Laundries, Inc., a

Louisiana corporation; **and that title to all claims against the defendants except those against B. C. McClellan and associates for their alleged fraudulent and illegal acts in connection with the sale passed to N. O. Laundries, Inc.**" (Emphasis supplied.)

3. **This Being a Derivative Action, Plaintiff Was Concluded by the Previous Judgment Against Another Stockholder Asserting the Same Cause of Action and Her Arguments in the Court Below and Here to the Contrary Are Without Substance.**

Crescent City Laundries, Inc., was a party to both cases and both being stockholders' derivative actions, the judgment in the first case is binding on other stockholders who could have intervened in the case. This is the universal rule.

> "A judgment in a representative stockholder's suit brought on behalf of the corporation or of all other stockholders similarly situated is a binding adjudication of the corporation's rights, and concludes other stockholders who had an opportunity to, but did not join or intervene." **50 Corpus Juris Secundum**, § 794, p. 333.
>
> "If the Federal Courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented." **King v. Realty Mortgage Co.**, 107 F. (2d) 90, 92 (C. C. A. 5th), citing **Supreme Tribe of Ben-Hur v. Cauble**, 255 U. S. 356, 41 S. Ct. 388, 342, 65 L. Ed. 673.
>
> "Generally stockholders similarly situated and for whose benefit the stockholders' suits are brought are bound by the decree." **13 Fletcher's Cyclopedia of Corporations, Permanent Edition**, § 6043.[4]

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[4] **Dana v. Morgan**, 232 F. 85; **Hearst v. Putnam Mining Co.** (Utah), 66 L. R. A. 784; **Matthews v. American Tobacco Co.** (Del.), 23 Atl. (2d) 301.

While the ruling first made in the **Kohler** case binds the plaintiff, the same ruling was made in cases to which this plaintiff was a party.[5]

The Georgia cases are in accord.[6] Indeed counsel for the petitioner recognized this rule in their previous position in judicio. In **Kohler v. Humphrey,** 174 F. (2d) 946, 947, counsel who now appear for Mrs. Tucker appeared for the Hibernia Bank who sought to intervene. The intervention in effect stated that if the Court was of the opinion that the suit was in behalf of the corporation . . . it is entitled to intervention of right to protect its interest **because it would be bound by the judgment.** (This sentence is reconstructed somewhat for emphasis.)

4. The Record Affirmatively Shows the Absence of Indispensable Parties.

The plaintiff here and in the court below makes a collateral attack on the sale of Crescent's assets by the Louisiana Sheriff. Before a court of equity can consider such an issue, the parties to the transaction, the plaintiff in the Louisiana action, the sheriff who made the levy and sale, the purchasers at the sale, the bondholders' committee, and New Orleans Laundries, Inc., are necessary parties. The District Court so held in the first **Tucker** case, 92 F. Sup.

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5 In the first **Tucker** case (188 F. [2d] 263) the Circuit Court thus referred to the litigation instituted by this plaintiff:

> "The protracted nature of this controversy, with its several appearances here, and particularly the fact that, under varying auspices, it continues to drag its slow and cumbersome length along **in complete disregard of the judgment of this Court in Kohler v. McClellan et al.,** makes it appropriate that . . . we set out something of its history."

And referring to both complaints filed by this plaintiff, it pointed out that:

> "Not only did she assert the one cause of action which this Court has preserved (the execution of a plan by B. C. McClellan and others to default the bond issue and to profit themselves by a purchase at the Sheriff's sale—a transaction with which none of the defendants here had any connection) but also asserted many of those **this Court's judgment had cut off.**" (Emphasis supplied.)

6 **Wagner v. Biscoe,** 190 Ga. 474, 9 S. E. (2d) 650; **Bethune v. Wells,** 94 Ga. 486, 21 S. E. 230; **Wesiosky v. Quarterman,** 123 Ga. 312, 314, 51 S. E. 426.

502, the Court of Appeals affirmed this holding and this Court denied certiorari.[7] The judgment of dismissal was a general judgment (R. 404, Case No. 211, 1951 Term).[8] This ruling is in accord with the ruling of this Court in **Shields v. Barrow**, 17 How. 130, and the decisions of the Court of Appeals for the Fifth Circuit collected in **Young v. Powell**, 179 F. (2d) 147, 152, and in this case (R. 197).

5. The Complaint Fails to State a Cause of Action Upon Which Recovery Could Be Had.

An excellent summary of the facts in the various complaints, including the one now under review, was made by the Court of Appeals in this case (200 F. [2d] 861) and discloses the absence of any facts upon which may be predicated any liability against these defendants. Most of the charges in this record and in previous records arise from transactions between Crescent and its own officers and directors. The only transaction between these defendants and Crescent City Laundries, Inc., was the distribution of voting trust certificates by the voting trustees on November 26th, 1928 (R. 62-63, first **Tucker** case, No. 211, 1951 Term). It appears, without contradiction, that these defendants and four others, the seven constituting the voting trustees provided for by a contract to which Crescent

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7 **Tucker v. National Linen Service Corporation**, 342 U. S. 828.

8 "Order.

"In the District Court of the United States for the Northern District of Georgia, Atlanta, Division.

"Mrs. Odile V. Hubert Tucker, etc., Plaintiff,
v. No. 367 Civil Action.
National Linen Service Corporation et al., Defendants.

"Upon consideration of this complaint and the motions of the various defendants, after argument heard and full consideration, it is

"Ordered, Adjudged and Decreed that the complaint be, and the same is hereby dismissed.

"This 21st day of June, 1950.

(S) Frank A. Hooper,
U. S. District Judge.

"Filed June 22, 1950."

was a party, signed a letter of direction addressed jointly to the Canal Bank and Trust Company, transfer agent, and the Whitney Central Trust and Savings Bank, Registrar of the voting trust certificates, directing the distribution of the 150,000 voting trust certificates issued in lieu of the 150,000 shares of stock which National Linen Service Corporation had delivered to the trustee (R. 194). On examining the allegation that 54,187 shares had been diverted to persons other than these defendants and charging these defendants with conspiracy and liability therefor, the Circuit Court of Appeals found an absence of facts on which recovery could be had (200 F. [2d] 861).

> "The voting trust contract specifically relieves the voting trustees 'of any responsibility by reason of any error of judgment or of law or fact, or of any matter or thing done or omitted under or in connection with the performance of this agreement, except for his own individual wilful malfeasance', and a further provision specifically relieves them from the liability for any mistake made by the registrar in the disposition of the National Linen stock."

Since the complaint does not disclose wilful malfeasance on the part of these defendants, and since they are specifically relieved of liability by reason of any error of judgment or fact, the District Court and the Court of Appeals correctly ruled against the plaintiff.

6. The Action Is Barred by the Statute of Limitations and Laches.

Plaintiff does not contend that the applicable statute of limitations has not run, she claims that by reason of concealment, the statute has been tolled. But the only transaction of these defendants with Crescent was the authorization of the stock distribution previously referred to. This was an open and notorious act and in no wise concealed. The fraud which tolls the statute of limitation

is a fraud which debars and deters the plaintiff from pursuing her action. The rule is clearly stated in **Middleton v. Pruden**, 57 Ga. App. 555, 196 S. E. 259, as follows:

> "The Code, §3-807, provides, 'if the defendant, or those under whom he claims, shall have been guilty of a fraud by which the plaintiff shall have been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud.' In determining whether fraud by which the plaintiff had been 'debarred or deterred' from his action mentioned existed, we should in order to differentiate it (in a sense, insulate it), from the allegations of fraud from which the cause of action sprang. And then we should look only to the facts (in their relation to the tolling of the statute of limitations), to see whether or not that kind of fraud mentioned in said section has been alleged, and it should be borne in mind that constructive fraud as well as actual fraud might give rise to a cause of action, whereas the only kind of fraud which would toll the statute of limitations is actual fraud. If this were not true, there would be no statute of limitations against fraud which gave rise to a cause of action unless and until it was discovered, even though it were obvious that the fraud could and should have been discovered by the exercise of ordinary care. In considering the issue whether or not the statute of limitations is tolled until the discovery of the fraud, the special difficulty may to some degree disappear if we bear in mind that the fraud which gave rise to the cause of action may be considered only as a circumstance incidental to the proof of guilt of a fraud by which the plaintiff has been 'debarred and deterred' from bringing his suit. In this State the courts have held that the fraud referred to in the Code, § 3-807, which tolls the operation of the statute of limitations, is not necessarily the same fraud which gives rise

to the cause of action. The fraud referred to in this Section must be actual fraud involving moral turpitude. **Barrett v. Jackson,** 44 Ga. App. 611, 159 S. E. 768."

Since no facts are alleged showing actual fraud, indeed there are no facts alleged showing any fraud, and since more than 20 years elapsed from the time the voting trustees ordered the distribution of the stock until the filing of this suit, the claims are barred by the statute of limitations.

The complaint is barred by laches [200 F. (2d) 864]. The record discloses that Byron C. McClellan was the principal actor in the formation of Crescent City Laundries and National Linen Service Corporation. He was represented by his executors in the first and second certiorari brought to this court and he died some years before this action was instituted. For the reasons stated by the Supreme Court of Georgia in **Citizens and Southern Bank v. Ellis,** 171 Ga. 717, 156 S. E. 603, the failure of the stockholders to assert any claims against these defendants while McClellan was in life and available as a witness to refute the claim is in itself sufficient grounds for dismissal of the action.

7. **This Court Will Not Grant a Writ of Certiorari to Determine Whether the Courts Below Properly Construed the Complaint or Weighed the Allegations of Fact Where the District Court Decisions Have Been Several Times Affirmed by the Court of Appeals.**

Both in the petition and in the brief it is claimed that the Court has misstated facts in the record, and that plaintiff has been deprived of a trial. Not only is there a failure to support these allegations but the entire record demonstrates the falsity of these claims.

In the decision of the Court of Appeals under review [200 F. (2d) 858, 860] the court points out that Kohler's

allegations received a full trial in which the greatest latitude of proof was allowed, and the District Judge held that the evidence did not justify a recovery. In a review of the first **Tucker** case [188 F. (2d) 263, 264] the Court points out that notwithstanding earlier rulings against the plaintiff on all issues except the one charging McClellan with a plan to wreck the company, the District Judge permitted evidence not only on the issues retained but on many of those which the previous judgment had cut off [188 F. (2d) 263, 264].

The identical attack upon the sale by the Louisiana Sheriff was made in the first **Kohler** case, overruled by the District Court and the Court of Appeals and elaborately briefed in this Court on the application for certiorari (No. 573, October Term, 1946, 329 U. S. 781, where certiorari was denied).

Since this case only involves the proper separation of the facts from unsupported conclusions and the construction of the complaint and exhibited documents, the record discloses a type of case in which this court uniformly denies certiorari. **Southern Power Company v. North Carolina Public Service Co.**, 263 U. S. 508.

The application for the writ should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. [redacted] 97

MRS. ODILE V. HUBERT TUCKER,
Petitioner,

VERSUS

NATIONAL LINEN SERVICE CORPORATION, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, SIDNEY W. SOUERS AND JOSEPH F. HAAS AND MRS. ILMA F. HAAS, EXECUTORS OF ESTATE OF HERBERT J. HAAS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 835

MRS. ODILE V. HUBERT TUCKER,
Petitioner,

VERSUS

NATIONAL LINEN SERVICE CORPORATION, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, SIDNEY W. SOUERS AND JOSEPH F. HAAS AND MRS. ILMA F. HAAS, EXECUTORS OF ESTATE OF HERBERT J. HAAS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE

The following statement, we believe, will help to clarify the questions to be considered by this Court in deciding whether the petition for certiorari should be granted.

The petitioner had previously filed suit on the same alleged cause of action against these same respondents, and others, in the same court. The record in that case is on file in this Court in case Number 211, October Term, 1951,

Tucker v. National Linen Service Corporation, et al., 342 U.S. 828, certiorari denied.

References will be made in this brief to that record as (T-1 R.....).

The Court may take judicial notice of the matters in that record.

National Fire Insurance Co. v. Thompson, 281 U.S. 331;

DeBearn v. Safe Deposit & Trust Co., 233 U.S. 24, 32;

Bienville v. City of Mobile, 186 U.S. 212;

Ellis v. Cates, 178 F. 2d, 791.

The present, as well as the former, suit filed by Mrs. Tucker, petitioner, was a derivative action in behalf of Crescent City Laundries, Inc. (formerly Laundry and Dry Cleaning Service, Inc.). It seeks to recover for that corporation the equivalent of 54,187 shares of the original common stock of National Linen Service Corporation, which shares have been split nine shares for one share of the original stock.

The theory upon which the petitioner claims that the corporation is entitled to recover is that upon the organization of National Linen in 1928, 50,000 of those original shares were issued to Sidney W. Souers, and his nominees, without any consideration being paid therefor and as a result of fraud practiced by Souers and others, including the other respondents, who were in a conspiracy with him. (T-1 R. 78, par. 111 and T-1 R. 232, et seq. "Exhibit C".) The other 4,187 original shares sought to be recovered were originally, in 1928, issued to Laundry & Dry Cleaning Service, Inc. (now Crescent City Laundries, Inc.) and were later issued

to B. C. McClellan, of New Orleans, Louisiana, who was president of that corporation (R. 48) (T-1 R. 69-71, paragraphs 83-86). It is claimed by the petitioner that this was in fraud of that corporation. McClellan died some years ago (T-1 R. 16) and his heirs, or personal representatives, are not parties to the case. It is not claimed that any of the respondents ever received any of those 4,187 shares.

On April 22, 1942, judgment was rendered by the Civil District Court of the Parish of Orleans, Louisiana, in favor of John F. Finke, Trustee, against Crescent for the principal amount of $1,700,000.00 plus interest (R. 51). Under fieri facias issued on said judgment (R. 52) the Civil Sheriff of Orleans Parish seized all of the assets of Crescent, and, after due advertisement, sold the same to the Bondholders Protective Committee of the mortgage bonds of Crescent (R. 57, par. 105). The Civil Sheriff conveyed said assets to said Bondholders Protective Committee (R. 58, par. 107). Among the assets seized and sold were:

> "All the Debtor's other choses in action and claims of any and every character against any and all persons whomsoever, whether or not shown upon the books of the Debtor, and all the Debtor's cash and other assets and effects of every name, character and description." (R. 58 and R. 140).

The Bondholders Protective Committee in turn sold and conveyed said assets to New Orleans Laundries, Inc. (R. 58, par. 109).

SUMMARY OF ARGUMENT

1. The petition for certiorari should be denied because:
   (a) Crescent was divested of the rights of action, if such ever existed. Under the Sheriff's sale in 1942 all

choses in action and claims of every character against all persons whomsoever belonging to Crescent were sold.

(b) Even if the Sheriff's sale was ever subject to attack on any of the grounds now urged by petitioner, the Bondholders Protective Committee and New Orleans Laundries, Inc. would be indispensable parties to any such proceeding.

2. The action as against Sidney W. Souers is *in personam* and not *in rem*. The Court does not have jurisdiction over Souers, who is a citizen of Missouri.

3. Souers is an indispensable party. The 50,000 shares of stock alleged to have been diverted from Crescent, and some of which was acquired by the individual respondents, were issued in pursuance of the three party contract (T-1 R. 232, 259, "Exhibit C"), to which Souers was a party. That contract can not be set aside or rescinded without Souers being a party to the case.

4. No facts, as distinguished from conclusions, are alleged to sustain the allegations that the 50,000 shares were issued to Souers and his nominees without any consideration and as a result of fraud. Souers was entitled to these shares in consideration of his services in organizing National and for underwriting its debentures. No facts are alleged showing that his services and his underwriting the indentures were not of value; and no facts, as distinguished from mere conclusions, are alleged showing any fraud.

5. Even if Crescent ever had any such right of action as claimed by the petitioner it would be barred by laches and the statutes of limitations under Georgia law.

ARGUMENT

1.

The Sheriff's sale divested Crescent of any of the rights of action asserted in this case.

Crescent having defaulted in the payment of its obligations, suit was filed against it on April 2, 1942 (R. 44). Judgment was rendered against it on April 22, 1942, for $1,700,000 plus interest (R. 51). Fieri facias was issued upon said judgment, and all of Crescent's assets were seized thereunder by the Sheriff (R. 52 and R. 117, 140). These assets, after due advertisement, were sold to Bondholders Protective Committee, of Crescent's bonds. Under this sale said Bondholders Protective Committee acquired title to all of Crescent's assets, including "All the debtor's other choses in action and claims of any and every character against any and all persons whomsoever, whether or not shown upon the books of the Debtor, and all the Debtor's cash and other assets and effects of every name, character and description." (R. 140). Bondholders Protective Committee transferred the assets to New Orleans Laundries, Inc. (R. 58).

Under the above facts, Crescent was completely divested of any of the rights of action which the petitioner is now seeking to assert in its behalf, if any such ever existed.

Kohler v. McClellan, et al., 156 F. 2d 908 (and authorities there cited in footnote on p. 910);

Tucker v. New Orleans Laundries, Inc., et al., 188 F. 2d, 263, 264.

The petitioner now seeks to collaterally attack the Sheriff's sale. None of the parties to the sale, except Crescent, is a party to this case. Clearly this can not be done. The purchasers at that sale, and their assigns, would of course be

indispensable parties to any such case. *Shields v. Barrow,* 58 U.S. 130; *Kohler v. McClellan,* 156 F. 2d. 908, 910.

2.

The action as against Sidney W. Souers is in personam, and not in rem. Souers is a citizen of Missouri and the court does not have jurisdiction over him.

While the complaint in the present case merely alleges, as to Souers and the stock held by him, that he accepted said stock without paying anything therefor (R. 28) and demands that "a constructive trust in favor of Crescent" be impressed upon said stock, and that the certificates therefor be cancelled (R. 84), the former complaint filed by the same plaintiff shows that the stock that was issued to Souers, and to his nominees (including the other respondents in whose behalf this brief is filed) was issued pursuant to the three party contract set out as "Exhibit C" to that complaint. (T-1 R. 232, 259). Under that contract Souers was to, and did, cause to be organized National Linen Service Corporation and underwrote its bonds (T-1 R. 256 and T-1 R. 43).

It is obvious that in order to grant the relief sought as against Souers and his nominees who received part of the 50,000 shares of common stock under that three party contract, it is essential that the contract be set aside, or totally ignored.

3.

Souers is an indispensable party.

The principle is too well settled to admit of dispute that a contract will not be set aside, or the rights of parties to the contract adjudicated, without the parties to the con-

tract, or their successors in interest, being before the court.

Shields v. Barrow, 58 U.S. (17 How.) 130;

Hudson v. Newell, (5th Circuit) 172 F. 2d, 848;

Young v. Powell, (5th Circuit) 179 F. 2d, 147;

Keegan v. Humble Oil & Refining Co., (5th Circuit) 155 F. 2d, 971;

United States v. Northern Pac. R. Co., (8th Circuit) 134 F. 715;

Calcote v. Tex. Pac. Coal & Oil Co., (5th Circuit) 157 F. 2d, 216;

Wilhelm v. Consolidated Oil Corpn., (10th Circuit) 84 F. 2d, 739;

Maya Corporation v. Smith (D. C. Del.) 32 F. 2d, 350.

See also *National Licorice Co. v. National Labor Relations Board,* 309 U.S. 350, 363, where the Court said:

> "Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. Shields v. Barrow, 17 How. (US) 130, 140, 15 L ed 158, 160; Carroll v. New York L. Ins. Co. (CCA 8th) 94 F (2d) 333; cf. Waterman v. Canal-Louisiana Bank & T. Co. 215 US 33, 48, 54 L ed 80, 86, 30 S Ct 10. Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present."

In *Hudson v. Newell,* supra, the court said (p. 852):

> "We know of no exception to the rule that an instrument cannot be destroyed totally by a decree unless all parties to it, or their successors in interest are before the court."

The plaintiff seeks to avoid the effect of this well established principle by claiming that the defendants, including Souers, are constructive trustees. But this, we submit, cannot change, or militate against, the principle above stated. In order to arrive at the conclusion that the parties who acquired the stock under the contract were guilty of such conduct as to constitute them constructive trustees it must, necessarily, be determined that they had no right to it under the contract. In other words it must, in this case, be determined, and in effect decreed, that the contract is void and is to be set aside.

In *Wilhelm v. Consolidated Oil Corpn.*, supra, the court held (84 F. 2d, 739, 746):

> "The plaintiffs who are now stockholders of Consolidated seek to rescind the exchange of their stock in the Pipe Company or in the Gas Company, or both, made in accordance with the terms of the tri-party agreement as an essential prerequisite to the granting to them of the other relief sought. The remedy of rescission is within the exclusive jurisdiction of equity. Equity acts in personam. A suit for rescission is a suit in personam and not in rem. Hence as to such plaintiffs this suit is clearly one in personam.
>
> "But the primary relief sought by all the plaintiffs is the rescission and cancellation of the tri-party agreement and the conveyances and transfers made pursuant thereto. Such relief is a prerequisite to the granting of the other relief sought by the bill; and such other relief is dependent thereon and incidental thereto. See Maya Corporation v. Smith (D. C. Del.) 32 F (2d) 350, 352.
>
> "In so far as the suit is one to set aside the tri-party agreement, it is clearly in personam, being the equivalent of a suit for rescission upon the ground of fraud. *In so far as it seeks to have the conveyances and transfers*

made thereunder cancelled and delivered up, and to declare the title to be in the plaintiffs, it is equally in personam. The court 'has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title'". (emphasis added)

In *International Refugee Organization v. Maryland Drydock Co.,* (4th Cir.) 179 F. 2d 284, 287, the court, in the opinion by Chief Judge Parker, said:

> "The fact that a court of equity will decree a constructive trust in property obtained by fraud or purchased with funds obtained by fraud does not mean that the title of the owner is defective or his possession tortious. *A constructive trust is not a title to or lien upon property but a mere remedy to which equity resorts in granting relief against fraud; and it does not exist so as to affect the property held by a wrongdoer until it is declared by a court of equity as a means of affording relief.* See Pomeroy's Equity Jurisprudence 4th ed. vol. 3, sec. 1044, pp. 2371-3; A.L.I. Restatement of Restitution sec. 160; 54 Am. Jur. pp. 169-170; Rolfe v. Gregory, 4 De Gex, J. & S. 576, 579; In re Farmers State Bank, 67 S.D. 51, 289 N.W. 75, 126 A.L.R. 619; Edwards v. Culbertson, 111 N.C. 342, 16 S.E. 233, 234, 18 L.R.A. 204. As said in the case last cited: 'The trusts of which we are speaking are not what is known as 'technical trusts' and the ground of relief in such cases is, strictly speaking, fraud, and not trust. Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the possession of the wrongdoer.' " (emphasis added)

In *Maya Corporation v. Smith,* (D. C. Del.) 32 F. 2d, 350, 352, the court said:

> "A bill which seeks judicial relief from a contract, and also relief under section 57, conditioned upon obtaining equitable relief with respect to the contract,

does not present a case under section 57 of the Judicial Code. See Storm Waterproofing Corporation v. L. Sonneborn (D. C.) 28 F. (2d) 115."

Petitioner relies upon *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, as authority in support of the contention that the suit as against Souers is *in rem*. That case, we submit, is clearly distinguishable and does not support the contention. There the plaintiffs had the title to the stock and held certificates therefor. The defendants were seeking to deprive them of the stock by having made a fraudulent assessment against it and by having a pretended sale of plaintiff's stock to satisfy that assessment. The Court held that the suit was one to remove the cloud from the title of the plaintiff's stock.

4.

No facts are alleged showing fraud or failure of consideration.

While the complaint abounds with allegations of *conclusions* to the effect that there was fraud and collusion and that there was nothing paid for the 50,000 shares issued to Souers and his nominees, no *facts* are alleged showing fraud, and the facts as disclosed by the records refute the contention that there was a lack of consideration. As we have pointed out, the records show that the three party contract under which National was organized provided for the 50,000 shares to be issued to Souers and his nominees for his having National organized and underwriting its bonds. No facts are alleged showing, or tending to show, that there was any failure whatever on Souers' part to fulfill his obligations under this contract. No facts are alleged showing, or tending to show that what Souers did was not worth what he got. The

common stock of National, which of course was inferior to the bonds and preferred stock, was of very doubtful, if any, value and so continued to be for many years.

5.

Even if Crescent ever had any such right of action as claimed it would be barred by statutes of limitations and by laches.

For the reason pointed out in the decision of the Court of Appeals and under the authorities cited in the footnote thereto (R. 199-200) we submit that Crescent would be barred from asserting any of the claims set forth, even if it ever had any such.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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